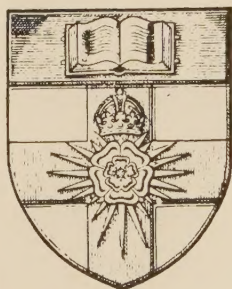


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Lords Justices of Appeal.

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CORRIGENDA.

- Page 65, line 3, for "*Marshall v. Jones*" read "*Marshall v. James*".
,, 75, ,, 27, for "*Topping*" read "*Toppin*".
,, 103, ,, 6 from end of head-note, for "*cover*" read "*recover*".
,, 205, ,, 11, for "*R. v. Farren*" read "*R. v. Farrell*".
,, 249, ,, 2 of head-note, for "*mandamus*" read "*rule*".
,, 266, ,, 2, for "*Jenks v. Turner*" read "*Jenks v. Turpin*".
,, 305, ,, 13, for "*Santen v. Busnach*" read "*Sanken v. Buenach*".
,, 491, ,, 1, delete "*Henry, K.C., and*".
,, 539, ,, 8, for "*deferred*" read "*enforced*".
,, 540, ,, 18, for "*written*" read "*within*".

MEMORANDA.

In the Hilary Sittings, 1914, the RT. HON. RICHARD ROBERT CHERRY was appointed Lord Chief Justice of Ireland in the room of the RT. HON. LORD O'BRIEN, resigned.

In the Trinity Sittings, 1914, the RT. HON. JOHN FRANCIS MORLARTY, His Majesty's Attorney-General for Ireland, was appointed a Judge of His Majesty's Court of Appeal in Ireland;

JONATHAN PIM, Esq., K.C., His Majesty's Solicitor-General for Ireland, was appointed Attorney-General; and

JAMES O'CONNOR, Esq., K.C., was appointed His Majesty's Solicitor-General for Ireland.

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C A S E S

DETERMINED BY

THE KING'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE IN IRELAND,

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL,

AND BY

THE COURT FOR CROWN CASES RESERVED.

1914.

BELL AND OTHERS *v.* THE LORD MAYOR, ALDERMEN,
AND CITIZENS OF THE CITY OF BELFAST (1).

(1913. No. 5729).

K. B. Div.
1913.

Nov. 11, 12,
20.

Lands Clauses Acts—Compulsory powers—"Owner"—Grantor of fee-farm conversion grant—Grantee's interest acquired by agreement—Entry on lands without grantor's consent—Action by grantor for wrongful entry and waste—Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 84—Belfast Corporation Act, 1911 (1 & 2 Geo. 5, c. cxc), ss. 3, 39—Renewable Leasehold Conversion Act (12 & 13 Vict. c. 105), ss. 7, 20.

Sect. 84 of the Lands Clauses Consolidation Act, 1845, enacts that the promoters of an undertaking shall not, except by consent of the "owners and occupiers," enter upon any lands which they are empowered to purchase until they shall either have paid to every party "having any interest" in such lands, or deposited in the bank, the purchase-money, or compensation agreed or awarded to be paid to such parties respectively for their respective interests therein.

Held, that the owner and occupier who may consent to entry are not identical with all persons interested; and that the estate of a grantor of a

(1) Before GIBSON and BORD, JJ.

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K. B. Div. fee-farm grant, made under the Renewable Leasehold Conversion Act, was
1913. not such as to make him owner of the lands within the meaning of sect. 84.

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CORPORATION. *Held*, also, that liability for waste under such fee-farm conversion grant does not extend to everything which could be deemed waste as between landlord and tenant, and that although as between landlord and tenant the conversion of land into a cemetery would have been restrained, such use of his fee-simple estate by a grantee of such grant was not actionable waste.

MOTION FOR JUDGMENT.

The action was brought to recover damages for wrongful entry by the defendants upon lands of the plaintiffs, situate within the county borough of Belfast, and for waste for wrongfully cutting and carrying away portion of the soil of the said lands, and felling timber and trees, and for an injunction.

By virtue of a fee-farm conversion grant, dated 4th June, 1858, Charles Nicholas Delacherois Purdon became seised in fee-farm of the lands in question; and by a sub-fee-farm conversion grant dated 21st October, 1862, the lands were granted by Charles Nicholas Delacherois Purdon to John Patterson, subject to the payment of the yearly fee-farm rent of £167 0s. 2d. All the estate and interest of Charles Nicholas Delacherois Purdon in the rent of £167 0s. 2d., and in the lands, subsequently and before action brought, had become vested in the plaintiffs.

Under the Belfast Corporation Act, 1911 (1 & 2 Geo. 5, c. cxc), the defendants were empowered to acquire, *inter alia*, the said lands for the purposes of cemetery extension. The defendants acquired the grantee's interest under the fee-farm grant of 1862 by agreement, and on the 6th June, 1912, the deed conveying the premises to the corporation was executed. Soon afterwards the corporation entered into possession of the property. On the 3rd June, 1912, the defendants opened negotiations with the plaintiffs' solicitors for the purchase of the rent payable to the plaintiffs. An offer of twenty-two and a half years' purchase was made, but the plaintiffs claimed twenty-five years' purchase plus 10 per cent. for compulsory purchase. In the course of further correspondence the plaintiffs' solicitors warned the defendants against entering upon the premises; but at the same time threatened to make the defendants liable under the

covenant to repair contained in the original grant. On the 15th May, 1913, an arbitrator was appointed to inquire into, and adjudicate upon, the claims of all persons having any interest in the lands. K. B. Div.
1913.

On the 20th May, 1913, the plaintiffs issued the writ in the present action, and subsequently delivered a statement of claim. In paragraph 10 of the statement of claim the cause of action was set out as follows:—"On or prior to the 14th May, 1913, the defendants, contrary to the provisions of sect. 84 of the Lands Clauses Consolidation Act, 1845, and without giving to the plaintiffs, or any of them, notice of intention to acquire the said lands or notice to treat, and without the consent and contrary to the wishes of the plaintiffs, and without having paid or secured to the plaintiffs any compensation in respect of their interest in the said lands, wrongfully entered upon the said lands, and cut down and uprooted certain timber and trees growing thereon, and committed great waste and spoil on the said lands, and stripped the surface of the said lands, and dug and excavated the soil thereof, and removed soil and earth from the said lands, and commenced to lay out the said lands as a cemetery, whereby great and irreparable damage has been, and is being, done to the said lands and to the reversion and interest of the plaintiffs therein, and whereby the security of the plaintiffs for the said fee-farm rent of £167 0s. 2d. has been, and is being, greatly diminished." The defendants, in addition to formal traverses, pleaded that they were lawfully in possession as assignees of the grantee's interest; that any act done by them was in the nature of meliorating waste; that before the issue of the writ they, by virtue of their statutory powers, had acquired the right to purchase compulsorily the plaintiffs' interest in the said lands (if any), and in the said rent; that all acts were done and all conditions fulfilled and performed enabling them so to do; and that at the time of the issue of the writ they were the equitable owners of the plaintiffs' interest in the land and rent, subject to the payment of such price as might be fixed by the arbitrator. In their reply the plaintiffs averred that while the defendants were empowered to acquire the lands for the purpose of extending the city cemetery, the only notification given to the plaintiffs was to the effect that the

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K. B. Div. defendants required and intended to acquire the lands for street
 1913. improvements, flood-prevention works, and an addition to the
 BELL corporation gas-works. They also challenged the validity of the
 v. arbitration on the ground that the requirements of sect. 4 of
 BELFAST the Railways Act (Ireland), 1851, had not been complied with.
 CORPORATION.

The action was tried by Dodd, J., with a jury, at the Belfast Summer Assizes, 1913. It was found by the jury that the plaintiffs sustained no damage. In his report the learned Judge stated: "Mr. Wilson undertaking to speed the arbitration proceedings, I was inclined to hold that the plaintiffs were entitled to an injunction at the time the writ was issued, but that it should not issue for a period of six months—but I was inclined to grant the costs of this hearing to the plaintiffs. I was of Mr. Gordon's opinion that an action was not maintainable either for injury to the possession, or injury to the reversion, but I thought the plaintiffs were entitled to sue for a breach of statutory duty. In any event, I thought public bodies must be kept strictly within their powers. I thought the principles in *Herron v. The Rathmines and Rathgar Commissioners* (1) were applicable, and I intimated my intention of making the defendants pay the costs. Counsel for the defendants strenuously resisted such an order, on the ground that it was not usual at Nisi Prius, and that the case was not one in which a Court of Equity would grant an injunction. I yielded, and left both parties to apply to the Court for such judgment as they may be entitled to, either for relief or for costs, allowing an appeal as to costs if such allowance were required."

Each party now moved for judgment.

D. M. Wilson, K.C., and *Newett*, for the plaintiffs:—

We submit that entry under the conveyance from the grantees, without the consent of the owners of the grantor's interest, was in defiance of section 84 of the Lands Clauses Consolidation Act, 1845, and that parties seeking to take lands under the statutory powers conferred by that Act must acquire the whole interest in the lands. By sect. 84 promoters shall not, except by consent of the "owners and occupiers," enter upon any lands until they

(1) [1892] A. C. 498.

shall either have paid to every party having "any interest" in such lands, or deposited in the bank, the purchase-money or compensation agreed or awarded to be paid to such parties respectively for their respective interests. The grantor in a fee-farm grant made under the Renewable Leasehold Conversion Act is an "owner" within the meaning of sect 84: see definitions of "owner" and "lands" in section 3 of the Act. The defendants could not lawfully enter without complying with the provisions of sections 84 and 85 of the Lands Clauses Act, 1845, as amended by section 36 of the Railway Companies Act, 1867 (30 & 31 Vict. c. 127). The principles applicable to such cases are well settled. Where the promoters of a public undertaking have authority from Parliament to interfere with private property on certain terms, any person whose property is interfered with by virtue of that authority has a right to require that the promoters shall comply with the letter of the enactment, so far as it makes provision on his behalf: per Lord Macnaghten in *Herron v. Rathmines and Rathgar Improvement Commissioners* (1). After notice to treat to the owner, promoters will be restrained from entering into possession by agreement with the tenant without compensating the owner: *Armstrong v. Waterford and Limerick Railway Co.* (2). In addition to their entry being wrongful, the defendants committed waste. Patterson could not have converted the lands into a cemetery, nor could he have cut down the trees; the corporation purporting to act as his assignees can enjoy no greater rights. To convert lands into a cemetery is waste: *Cregan v. Cullen* (3). As to the defence of equitable ownership, we say the defendants could have become equitable owners only by compliance with the statute; but the statute has not been followed, because the appointment of the arbitrator was informal, owing to the misleading notice of appointment issued, and the imperfect schedule given. Even where no actual damage has been sustained, promoters who did not comply strictly with their statute have been restrained: *Mayor of Devonport v. Plymouth, Devonport, and District Tramways Co.* (4).

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(1) [1892] A. C., at p. 523.

(2) 10 Ir. Eq. R. 60.

(3) 16 Ir. Ch. R. 339.

(4) 52 L. T. 161.

K. B. Div. *Ronan, K.C., Gordon, K.C., Chambers, K.C., and T. Harrison,*
 1913. for the defendants :—

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The defendants in this case entered, not under the provisions of the Lands Clauses Act, but as owners in fee in possession under the voluntary purchase from Patterson. In such cases the Court never grants an injunction : *Birmingham and District Land Co. v. London & Nth.-Western Railway Co.* (1), per Lindley, L.J., at p. 280 ; per Bowen, L.J., at p. 284. This is really an action for trespass, and for an injunction to restrain trespass. Can it be contended that the grantees have no title against the grantor, although he has by covenant guaranteed them peaceable and quiet enjoyment ? The possession taken by promoters who acquire lands under the Lands Clauses Act is in all respects equivalent to possession voluntarily given to a purchaser under a completed contract of sale : *Tiverton and North Devon Railway Co. v. Loosemore* (2), per Lord Watson, at p. 501. The promoters here were in the same position as parties entering with the consent of the owners under the statute. A consent to permit the promoters to enter on any lands cannot be revoked when once given, so as to place the promoters in the position of trespassers ; and the only remedy of the owner is to take the necessary steps to compel the assessment and payment of compensation : *Cripps on Compensation*, 4th ed., p. 78 ; *Knapp v. London, Chatham, and Dover Railway Co.* (3) ; *Doe d. Hudson v. Leeds and Bradford Railway Co.* (4). The effect of consent is to bring the promoters under the protection of their statutory powers ; but if no consent has been given, and the promoters have not complied with the statutory conditions as to entry on lands, they can be proceeded against as trespassers by any owner who has an interest in the lands : *Ramsden v. Manchester, &c., Railway Co.* (5). A rightful owner, rightfully in possession, is entitled to hold the property till it is decided in due form of law that some other person is entitled to it : *Bygrave v. Metropolitan Board of Works* (6), per Bowen, L.J., at p. 152. The consent of every person interested in the lands is not required ; the persons whose consent is required

(1) 40 Ch. D. 268.

(2) 9 App. Cas. 480.

(3) 2 H. & C. 212.

(4) 16 Q. B. 796.

(5) 1 Ex. 723.

(6) 32 Ch. D. 147.

are the "owners and occupiers," and the plaintiffs here, who are the owners merely of rent issuing out of the lands, are not owners of land within the meaning of sect. 84. A broad distinction is made in the Lands Clauses Act between owners, and parties having any charge on lands. "Owner" is referred to as any person entitled to "sell and convey": sections 3 and 85; while under sect. 115, and the sections immediately following, any person entitled to a charge shall execute "a release of such charge." *Armstrong's Case* (1) is distinguishable, because there the promoters had not acquired an independent title. The plaintiffs cannot sue for waste, because there is no reversion: *Les Termes de la Ley*, 300. Moreover, to entitle the plaintiff to succeed in such an action there must be substantial damage; but here the jury has found that there was no damage: *Governors, &c., of Harrow School v. Alderton* (2); *Holyoake v. The Shrewsbury and Birmingham Railway Co.* (3). There is no case where the grantee of a fee-farm grant, in a position similar to that occupied by the defendants, has been restrained from committing waste.

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Newett, in reply.

The defendants must be presumed to have acted under the powers of their special Act, and are, therefore, promoters within the scope of sect. 84. Under a fee-farm conversion grant there is a statutory reversion, and the grantee under such a grant may be restrained from committing waste: *Gore v. G'Grady* (4). [He also referred to the Renewable Leasehold Conversion Act, 12 & 13 Vict. c. 105, sect. 7; Landlord and Tenant Act (Ireland), 1860, sect. 25; *Legg v. Belfast and Ballymena Railway Co.* (5).]

Cur. adv. vult.

GIBSON, J. :—

Nov. 20.

The point for decision is whether, no damages having been assessed or asked to be assessed, and the security for the plaintiffs'

(1) 10 Ir. Eq. R. 60.

(2) 2 Bos. & P. 86.

(3) 5 Railway and Canal Cases, 421.

(4) 1 I. R. 1 Eq. 1.

(5) 1 Ir. C. L. R. 124, note.

K. B. Div. rent not having been prejudiced by anything done by the
1913. defendants, the plaintiffs are entitled to the injunction sought.

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The action is founded on a supposed infringement of sect. 84 of
the Lands Clauses Act, 1845, which the plaintiffs, relying on
Armstrong's Case (1), contend gives them a right to this form of
relief.

Gibson, J.

The object of the action, which has arisen out of a refusal to pay the plaintiffs the amount of compensation demanded, is, under the form of an injunction, to impose on the defendants liability to pay 5 per cent. interest on the compensation awarded from the time of their entry on the lands. The defendants, under the Belfast Act, 1911 (1 & 2 Geo. 5, c. cxc), sects. 3 and 39, were empowered to acquire the lands for cemetery purposes under the Lands Clauses Acts—an expression defined in the Interpretation Act as including the Railways Act (Ireland), 1851, and amending statutes.

The plaintiffs are the owners of the grantor's interest in a statutory fee-farm grant, dated 21st October, 1862, and themselves hold under a statutory fee-farm grant, dated 4th June, 1858. The defendants acquired the grantee's interest under the deed of 1862 by deed dated 6th June, 1912, and entered soon after under that title. The cause of action stated in paragraph 10 of the claim is that, contrary to sect. 84 of the Act of 1845, the defendants, without notice to treat, without consent, and without having paid or secured compensation, wrongfully entered, cut trees, committed waste, and commenced to lay out the lands as a cemetery. The paragraph does not refer to the buildings or water rights mentioned in paragraph 7 of the claim, and no breach of any covenant is alleged; £1,000 damages were claimed, and an injunction, to which latter relief the present motion is confined. The main defences are a justification under the deed of 1912, and an allegation of equitable ownership founded on the appointment of Mr. Sweeney, as arbitrator, on May 15th, 1913, five days before the action was launched.

In deference to the able arguments of counsel, I state my

(1) 10 I. E. R. 60.

conclusion on some of the points raised which do not appear to require detailed discussion :—

(1) The action is plainly one by the plaintiffs as supposed "owners" to restrain the violation of a statutory prohibition—it is not for trespass.

(2) It was competent to the defendants, who were authorized to make the cemetery, to acquire the necessary lands for that purpose by purchase: they might buy some interests by agreement, and expropriate others under their compulsory powers.

(3) There being no notice to treat (a procedure excluded by the Act of 1851), and sect. 68 of the Lands Clauses Act being also excluded, until the arbitration procedure constituting machinery for expropriation was set up, the rights of non-consenting owners were unaffected. The defendants, as representing the fee-farm interest, were liable to the plaintiffs in respect of rent and covenants, and for waste if that could be sued for.

(4) When the arbitration was set in motion, reciprocal rights arose; the plaintiffs could compel the defendants to carry out expropriation in accordance with the prescribed conditions: *The Queen v. Birmingham and Oxford Junction Railway Co.* (1); and the defendants were entitled to exercise statutory powers, and to enjoy statutory protection to the extent given by the code.

Passing from these topics, I come to the difficult questions on which our decision must depend. The first of these is, what is the nature of a grantor's estate under a statutory fee-farm grant? Under the Act 12 & 13 Vict. c. 105, there are two fee-simples—one in the rent, the other in the land. To the rent (which is invested with the properties of rent-service (sec. 20)), rights to enforce all covenants, and to maintain ejectment for non-payment of rent or for condition broken, are made incident or attached. Can the grantor sue for waste? Lord Redesdale's opinion that, in the case of a lease perpetually renewable, such remedy was incompetent, was long since overruled: *La Touche's Furlong*, 678, and authorities there noted. The cases all relate to bog, turf, or minerals—all matters comprised in sect. 4 of 12 & 13 Vict. c. 105. A statutory fee-farm grant may, however, obviously stand in a

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(1) 15 Q. B. 634.

K. B. Div. different position: *Gore v. O'Grady* (1), affirmed on appeal,
 1913. decides that such grantor could sue for waste committed by
 13 LL cutting turf for sale. The judgment was mainly based on
 v. sect. 4 of 12 & 13 Vict. c. 105, relating to turf, trees, mines, and
 BELFAST royalties, all involving subtraction from the realty of substance
 CORPORATION which, if severed, would be a chattel belonging to a landlord
 TION. owner. The Act of 1860 (Deasy's Act), sect. 25, treats grantees
 Gibson, J. of perpetual interests, after January, 1861, as impeachable for
 waste, if fraudulent or malicious, or if the act is forbidden by
 the lease or grant; and it contains a proviso that a grantee under
 a statutory fee-farm grant may be subject to a more extensive
 liability. But does such liability extend to everything which
 could be deemed waste as between landlord and tenant: *e.g.* the
 conversion of ancient pasture into arable land? See examples,
La Touche's Furlong, p. 675. I do not think so. Notwithstanding
 some general expressions in the judgment in *Gore v. O'Grady* (1),
 I question if the decision can be applied to cases outside sect. 4.
 That section would supply a subject-matter for the proviso in
 sect. 25 of the Act of 1860 to operate on; and acts prohibited
 by the grant might also be regarded as, in certain cases, waste.
 Though therefore, as between landlord and tenant, the conversion
 of land into a cemetery would have been restrained, such use of
 his fee-simple estate is not unlawful on the part of a statutory
 grantee. A few trees of small value have been cut, but though
 they might come within sect. 4 of 12 & 13 Vict. c. 105, sect. 31 of
 the Act of 1860 (as to cutting trees) contains no proviso such as
 is found in sect. 25. Even if such cutting was wrongful, no
 damage was asked for at the trial on this head, and an injunction
 could not be supported in respect of these trees.

As to the character of a grantor's estate, it is described in the
 provisions of the statute. In *Maunsell's Estate* (2), Ross, J., held
 that the fee-simple rent was a rentcharge which would be barred
 by non-payment, which is not quite the same question as that
 which I have been considering. A fee-simple rent invested by
 statute with properties of rent service, with rights of action in
 respect of all covenants in the grant, and capacity to support a

(1) 1. R. 1 Eq. 1.

(2) [1911] 1 L. R. 271.

suit of waste or ejectment, is an anomalous hybrid not easy to bring within any legal principle or classification.

My opinion being that if the defendants had been private owners under the fee-farm grant, which contains no restrictive covenants, they could not have been prevented from laying out the cemetery—a step which has not affected the security of the rent, and which was not malicious—I now turn to sect. 84 of the Act of 1845, which is supposed to have been violated. Counsel agree that this section is in force and unaffected by our Irish statutes of 1851 and 1860. It would appear to me that sect. 85, closely connected with sect. 84, and possibly depending on notice to treat, is displaced by sect. 2 of the Act of 1860, c. 97; and the argument might be possible that sect. 2, though expressed affirmatively, negatived any other right to enter: *Stoneham's Case* (1). I shall, however, deal with sect. 84 as the provision in force which must determine the parties' rights. It, and not alleged waste, is the basis of this action.

What sect. 84 forbids is entry except by consent of owners and occupiers; that is, the consent of both. Without such consent the compensation payable to any party having any interest in the lands must be paid or deposited in "manner herein mentioned," words which appear to refer to sect. 85. Wilful entry, save as aforesaid, is punishable under sect. 89 under penalty payable to the party in possession. The object of the section, with sect. 85, is to secure payment of the compensation with interest at five per cent. from entry.

The defendants contend that the "owner" spoken of is the person owning the land in its physical aspect, and not a person having rentcharges or other hereditaments such as the plaintiffs' fee-farm rent. Sect. 85, which supplies the conditions for entry and user, has been held by Lord Cairns and Lord Watson in the *Tiverton Case* (2) to be only applicable where there has been notice to treat; and our Act of 1860, in sect. 2, in terms only applies after arbitration. The Legislature uses different forms of expression. In the Act of 1851 it is "owners or reputed

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(1) L. R. 7 Q. B., at p. 8.

(2) 9 App. Cas. 480.

K. B. Div. owners, lessees, or reputed lessees and occupiers." In the Rail-
 1913. ways Clauses Act, 1845, where, however, the definition of "lands"
BELL is different, "owner and occupier" refer to land in its physical
v. character, see sects. 31, 42, 68. The cases on sects. 84 and 85 in
BELFAST Hudson, Lloyd, and Cripps all relate to ownership of land as a
CORPORATION. visible thing, and the point now argued seems new. These
Gibson, J. sections precede provisions as to commoners' rights, as to which
 see *Stoneham's Case* (1); as to mortgagees, for whose protection
 sect. 114 has special provisions as to possession: *Ranken's Case* (2);
Martin's Case (3). Section 115, following the above special
 provisions, treats rentcharges, &c. as something to be released,
 and not as lands to be sold and conveyed.

Does "owner" in sect. 84 mean "every party having any interest in such lands"? Does the latter expression point to tangible material interests? Or does it include all interests, corporeal and incorporeal? The more extensive meaning would be supported by sects. 68, 85, and our Act of 1860, sect. 2. However the expression is understood, the frame of the section makes it difficult to read "owner and occupier" as equivalent to "party having any interest." No doubt it may be asked why should the consent of the owner and occupier have the effect of depriving parties interested of the benefit of sect. 85; but it may have been considered that such consent was on the one hand a protection to minor interests, and on the other hand that promoters might be justified in taking possession in reliance on the persons actually seised of the lands, without investigation of invisible incorporeal rights, &c. Possession might be obtained from the various visible occupiers long before notice to treat was served on the parties with other interests. Expedition and the interests of the public were to be considered. The section is phrased in negative terms, and does not purport to divest interests. Whether the compensation for such interests, when assessed, should carry interest from the date of possession taken, or from a later date, is not before us for decision. The normal rate is 4 per cent. Where

(1) L. R. 7 Q. B. 1.

(3) L. R. 1 Ch. 501.

(2) 12 Beav. 298.

sect. 85, or sect. 2 of the Act of 1860, is brought into play, *K. B. Div.*
the rate is 5 per cent. 1913.

I am of opinion that the owner and occupier who may consent to entry are not identical with all persons interested. The owner, like the occupier, is someone whose land is capable of being entered on and possessed. Who the owner may be in the case of an estate split into several derivative estates, I do not attempt to define. Exercising statutory powers, it would be obviously safer to rely on the statutory method under sect. 2 of the Act of 1860, though this would cause delay. The defendants here purchased the fee-simple long before there was any quasi-purchase by arbitration of the plaintiffs' estate; I do not think that in entering under their conveyance they violated any right of the plaintiffs.

Assuming, however, that the plaintiffs might be deemed to be technically owners, would that entitle them to compel the defendants to withdraw from possession? The object of the section was to protect from possible damage to the several proprietary interests occasioned by the promoters' operations, *prima facie* in the nature of waste. Here, had the lands been in the ownership of a private person, and been turned by him into a cemetery, such act would not, as against the plaintiffs, have constituted actionable waste. *Armstrong's Case* (1) differs from the present in several particulars. The plaintiffs there had a true reversion, and what the defendants were doing was, as against the plaintiffs, waste. There had been a notice to treat, making the plaintiffs quasi-vendors, whereas here the defendants' entry was long before such relation. Our Railway Code, excluding sect. 68 of the Lands Clauses Act, does not affect the owner's common-law rights till the expropriation procedure is utilized, and up to that period he does not need any special safeguard. Further, a year has been allowed to elapse before action. In *Cooke v. London Co. Council* (2), where the defendants took possession by the mortgagor's consent, without that of the mortgagee, it did not occur to counsel or to Mr. Justice Parker that an injunction should be granted on the ground of violation

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(1) 10 Ir. Eq. R. 60.

(2) [1911] 1 Ch. 604.

K. B. Div. of the statute, or that interest should be awarded at 5 per cent.
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It is admitted that if sect. 84 does not apply the action fails. I am of opinion that there was no actionable waste, and that the plaintiffs' estate as grantor was not such as to make him owner of the lands within sect. 84. Whether the other matters to which I have adverted might not also constitute a defence, I do not deem it necessary to decide.

The defences founded on the supposed transfer of the property by virtue of the arbitration, and on the view that the construction of the cemetery was, if waste, meliorating waste, are both manifestly untenable, and the latter humorous. No argument was addressed to them. Nor, on the other hand, did the plaintiffs' counsel seek to support the reply challenging the validity of the arbitration. The arbitration would seem to be rather a point in the plaintiffs' favour, as it is on the basis of the effectual exercise of compulsory powers.

The verdict and judgment with costs, including the costs of this argument, must be entered for the defendants. My brother Boyd agrees in this conclusion.

Solicitors for the plaintiffs: *Crawford and Lockhart.*

Solicitor for the defendants: *John M'Cormick.*

C. L.

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June 11, 24,
25.

Local Government—Labourers (Ireland) Acts—Improvement scheme founded on representation signed by agricultural labourer—Right of action of labourer if not given preference on first letting—Plot suggested in representation not included in scheme—Omission of rural district council to make regulations for letting of cottages—Jurisdiction of Local Government Board as to selection of labourers for cottages—Labourers (Ireland) Act, 1906 (6 Edw. 37, c. 7), s. 29.

Where land is acquired by a rural district council under an improvement scheme, made under the Labourers (Ireland) Acts and founded on a representation made on behalf of an agricultural labourer, such labourer has an action for damages against the district council if guilty of a breach of their statutory obligation, under sect. 29 of the Labourers (Ireland) Act, 1906 (2), to give him a preference on the first letting of a cottage or allotment.

The action lies notwithstanding the omission by the district council to make regulations, pursuant to sub-sections 2 and 3 of section 29, providing for the giving of preference to agricultural labourers who have signed the representation on which the scheme is founded.

The action lies notwithstanding that the particular plot suggested in the representation as a site for a cottage for such labourer is not included in the scheme.

The selection of labourers for particular cottages is a matter outside the jurisdiction of the Local Government Board.

(1) Before PALLES, C.B., and MADDEN and KENNY, JJ.

(2) 6 Edw. 7, c. 37, s. 29, sub-s. 1: "The district council shall make regulations with respect to the letting of cottages and allotments under the Labourers Acts, and for preventing any undue preference in the letting thereof, and generally for carrying the provisions of the said Acts into effect."

Sub-s. 2: "Regulations under this section shall provide that, on the first letting of any cottages or allotments comprised in a scheme, preference shall be given to agricultural labourers who have signed on their own behalf the representation on which the scheme was founded, or on whose behalf that representation was made."

Sub-s. 4: "Regulations under this section shall not be of any force until confirmed by the Local Government Board in like manner and subject to the like provisions as in case of bye-laws under the Public Health (Ireland) Act, 1878."

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CASE STATED by Palles, C.B., on the hearing of a civil-bill appeal.

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The appeal was from a dismiss pronounced by the County Court Judge of county Fermanagh. The civil-bill was for £50 damages for that the defendants the Lisnaskea Rural District Council, being under a statutory obligation under the Labourers (Ireland) Acts to provide a plot of land and a cottage for the plaintiff, refused to provide such; and for that the defendants, the said council, being under a statutory obligation to give the plaintiff a preference in the allotting of a plot of land in the townland of Derrylin, refused to give the plaintiff the said preference, and gave the plot in question to the defendant William Blake, a person who was not, under the said Acts, entitled to such plot; and for an injunction restraining and prohibiting the defendants, the said council, from permitting the said lands to be occupied by any other person than the plaintiff. The annual value of the lands was stated not to exceed £30. Damages were sought against the defendant William Blake for aiding and abetting the defendants the council in their illegal acts, and for trespassing on the said plot.

The Lord Chief Baron dismissed the civil-bill as against William Blake without costs, and no question arose as against him.

As regards the rural district council, the following were the material facts stated by the Lord Chief Baron to be found by him or admitted:—

The plaintiff was an agricultural labourer residing in the rural district of Lisnaskea. The Lisnaskea Rural District Council, prior to framing a scheme for the acquisition of land and the building of cottages under the Labourers (Ireland) Acts, had issued the usual advertisements intimating their intention to frame such scheme. Two representations (*inter alia*) under the Labourers Acts were lodged with the district council. One of these was lodged on behalf of the plaintiff, and suggested a cottage and plot for him, the cottage to be built for him in the townland of Mullyneeny, on the lands of Mr. Patrick Blake, the chairman of the Lisnaskea Rural District Council. The other representation had been lodged on behalf of John Curry, suggesting a cottage and

plot of land for him, the cottage to be built on land in the town-land of Derrylin, also the property of Mr. Blake.

The council considered the representations, and decided that it would not be reasonable to take two plots and erect two cottages on Mr. Blake's land. The chairman wrote at the foot of the representation on behalf of the plaintiff—"Rejected; too many applications for plots on same farm." The council decided to accede to the representation of John Curry for the plot in Derrylin. The district council framed a scheme in the form No. 15 in the schedule to the rules of the Local Government Board of November, 1906. Among the sites mentioned in the schedule to the scheme was a site described as "Doon, Derrylin, site No. 6, No. 38, 1A. 20P." The scheme did not set out the name of the labourer on whose representation the cottage was to be acquired. The scheme, and copies of the representations on which it was based, were sent forward to the Local Government Board.

On the 2nd November, 1909, a Local Government Board inquiry was held by an inspector of the Local Government Board as to the propriety of confirming the scheme. In the interval between the framing of the scheme and the holding of the inquiry, Curry had left the district and had not returned. Mr. Murphy, the plaintiff's solicitor, appeared at the inquiry and asked to have the cottage for which Curry had applied given to the plaintiff. Evidence was given that the plaintiff was an agricultural labourer, and that the house in which he was then living was unfit for habitation. It was not proved that the rural district council or Curry received notice of the application on behalf of the plaintiff. The Local Government Board inspector acceded to Mr. Murphy's application, and wrote in the column for observations on the schedule of cases allowed after local inquiry, opposite the entry "Doon, Derrylin, 6, 38, 1A. 20P.," the words "Thomas Tevlin to be substituted for original applicant."

The inspector wrote to the Lisnaskea District Council giving particulars of eight cases in which he had changed the names of the labourers who originally applied, and had substituted the names of other applicants. The name of the plaintiff was one of the eight. The letter was read, and entered as "read" upon the minutes of the council. The council did not make any objection.

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A Provisional Order, dated the 2nd December, 1909, was issued by the Local Government Board, sanctioning the acquisition of (*inter alia*) the plot 6, 38, in the townland of Derrylin. This Order was made by the Local Government Board under the belief and with the intention that the cottage should be let to the plaintiff. The rural district council proceeded to enforce the Provisional Order and acquire the plot in question 6, 38, and paid Mr. Patrick Blake therefor the price awarded by the arbitrator; and such plot became legally vested in the district council.

At a meeting of the council held on the 2nd March, 1912, a resolution was passed by a majority of the council, accepting as tenant of the site in question the defendant William Blake, who had sent in an application for it on the ground of Curry's absence in America. It was not proved that the house in which Blake resided was unfit for habitation. A motion to rescind the letting to Blake, and to let the plot to the plaintiff, was made at a subsequent meeting, and rejected. On the 11th April, 1912, the assistant secretary of the Local Government Board wrote to the clerk of the rural district council pointing out that the plot in question was passed by the inspector at the local inquiry for Tevlin, and that the Board considered it the duty of the Council to take steps at their next meeting to make a letting to Tevlin.

The Lord Chief Baron stated that it was not proved that the district council ever exercised any discretion which they had in favour of the plaintiff. It was not proved whether any regulations had been made by this council under sect. 29 of the Labourers (Ireland) Act, 1906. On the requisition of the plaintiff's counsel, the Lord Chief Baron stated the present case, assessing the damages provisionally at £50.

The question for the opinion of the Court was, Did the facts stated disclose any actionable breach by the defendants of any duty due by them to the plaintiff?

Wylie (with him, *Henry, K.C.*), for the plaintiff:—

The scheme was founded on a representation under sect. 4 of the Labourers (Ireland) Act, 1883. A representation means a representation signed by not less than three persons, each of whom

is either rated for the relief of the poor within the sanitary district, or is included in the definition of an agricultural labourer in the Labourers Acts: Irish Land Act, 1903, sect. 97; Labourers (Ireland) Act, 1906, sect. 1, sub-s. 2. The scheme in the present case was founded on such a representation signed by, amongst others, the plaintiff, who is an agricultural labourer within the definition in the Acts. He was therefore entitled under sect. 29 of the Labourers (Ireland) Act, 1906, to a preference on the first letting of the plot in question. Instead, however, of making the letting to the plaintiff, the district council made it to a person who had not signed the representation, and whose house was not shown to be unfit for habitation. It is immaterial that the particular plot mentioned in the representation was not included in the scheme. The mention of the plot is merely a "suggestion": Form 2 of Forms in schedule to Labourers (Ireland) Order, 1906. The Local Government Board inspector had power to amend the representation and the scheme: Labourers (Ireland) Act, 1896, sect. 1, sub-s. 3; Labourers (Ireland) Act, 1885, sect. 15, sub-s. 2. The district council made no objection to the amendment, and the Provisional Order sanctioning the scheme was made by the Local Government Board under the belief that the plot should be let to the plaintiff. The council are therefore estopped from denying the plaintiff's right to the first letting: *Cairncross v. Lorimer* (1). An action for damages lies against the district council. A body created by statute has the same duties, and its funds are subject to the same liabilities, as a private person: *Mersey Docks Trustees v. Gibbs*, per Blackburn, J. (2).

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Gerald Dougherty, for the Local Government Board.

Murnaghan and M'Loone, K.C. (with them, *Sergeant Sullivan*, K.C.),
for the defendants, the Lisnaskea Rural District Council.

There is no estoppel as regards the plaintiff. The scheme does not set out the names of the labourers. The estoppel, if any, would be as between the district council and the person whose lands were taken. The district council may make an improvement

(1) 3 Macq. 827.

(2) L. R. 1 H. L. 93, at p. 110.

K. B. Div. scheme although no representation has been made. The letting
 1913. here was not the letting referred to in sect. 29 of the Act of 1906,
 but a temporary letting under sect. 15 of the Act of 1886.

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The plaintiff has no right of action for damages. Sect. 29 of the Act of 1906 does not in itself give a right of preference to labourers who have signed the representation, but merely enacts that regulations shall be made providing for such preference. By sub-s. 4 such regulations are declared to be of no force until confirmed by the Local Government Board. The plaintiff's remedy is by mandamus to compel the district council to make, and submit to the Local Government Board, regulations for letting in accordance with sect. 29: *Rex (Ferguson) v. Lurgan Rural District Council* (1). Or he may make a complaint to the Local Government Board under sect. 15 of the Public Health (Ireland) Act, 1896, the Public Health Acts being incorporated with the Labourers Acts: *Attorney-General (Schofield) v. Dunmanway Rural District Council* (2). Where an Act creates an obligation, and enforces its performance in a particular manner, the general rule is that performance cannot be enforced in any other manner: *Doe v. Bridges*, per Lord Tenterden, C. J. (3). An action does not lie by an individual against a public authority for default in performing a duty, unless the Legislature expressly gives a right of action: *Saunders v. Holborn District Board of Works* (4); *Davis v. Bromley Corporation* (5); *Harrington (Earl of) v. Derby Corporation* (6), per Buckley, J.; *Cowley v. Newmarket Local Board* (7).

Henry, K.C., in reply:—

Sect. 29 of the Act of 1906 gives a statutory right of preference, and the district council cannot, by omitting to make regulations under the statute, deprive the plaintiff of his statutory right. The suggestion of sites is not an essential part of the representation. Sect. 5 of the Labourers Act of 1883, which provided by its last clause that the representation should contain a suggestion of the

(1) 47 I. L. T. R. 31.

(2) 47 I L. T. R. 11.

(3) 1-B. & Ad. 847, at p. 859.

(4) [1895] 1 Q. B. 64.

(5) [1908] 1 K. B. 170.

(6) [1905] 1 Ch. 205, at p. 222.

(7) [1892] A. C. 345.

proposed sites, has been repealed; a representation is now sufficient if it represents that the circumstances of the section of the rural district to which it relates are such that it is the duty of the district council to take proceedings under the Labourers Acts therein: Labourers (Ireland) Act, 1906, sect. 1, sub-sect. 1; sch. The plaintiff is entitled to preference not merely in the first letting of the cottage when built, but also in the first letting of the allotment: *Ib.* sect. 29, sub-sects. 1, 2. All the cases cited to show that such an action does not lie against a public authority were cases of non-feasance. This is a case of misfeasance. In *Wolverhampton New Waterworks Company v. Hawkesford* (1), Willes, J., classifies the cases in which a liability may be established by statute. The present case comes within the second class mentioned by him, viz., the cases in which a statute has created a liability, but has given no special remedy for it; there, he says, the party may adopt an action of debt or other remedy at common law to enforce it. There is no remedy here under sect. 15 of the Public Health (Ireland) Act, 1896. That Act is not incorporated with the Labourers Acts, and, even if it were, it would not apply, as it deals only with cases of default of the local authority to perform its duty. This is a case, not of default, but of misfeasance. [He also referred to *Clements v. Tyrone County Council* (2).]

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PALLES, C.B. :—

June 25.

This case, which comes before us on a case stated, raises an interesting question on the construction of the Labourers Acts. The material facts are few. In reply to the ordinary advertisement of the local authority as to lodging representations, two representations, amongst others, were lodged; one by Tevlin, the plaintiff, and another by a man named Curry. Each of them sought plots of ground on the lands of a Mr. Blake, the chairman of the rural district council. When the representations came to be considered by the district council, they rejected the application of Tevlin, considering that two labourers' cottages on the lands of the chairman would be too much, and they granted the application of Curry. A public inquiry was then held. In the interval between the meeting of the district council and the public inquiry, Curry

(1) 28 L. J. C. P. 242, at p. 246.

(2) [1905] 2 I. R. 415, 542.

K. B. Div. 1913. ceased to be an agricultural labourer within the meaning of the Acts. He left the country and went to America. At the public inquiry the Local Government Board inspector, in accordance with what has been stated to us by Mr. Dougherty, the counsel for the Local Government Board, to be the usual practice, considered who should have the cottage granted upon Curry's application, and came to the conclusion it should be given to Tevlin. The usual scheme, founded on the representations (*inter alia*) of Tevlin and Curry, was then approved of, which of course under the Act of Parliament did not contain the names of any of the persons who were to be occupiers of the cottages. That scheme was confirmed by the Local Government Board, and acquired the force of an Act of Parliament. The lands having been acquired by the local authority under the provisions of the scheme, the local authority proceeded to allot them, and they altogether omitted to act according to the provisions of the 29th section of the Labourers (Ireland) Act, 1906. They made the first letting of the allotment, before the cottage was built, to a person who not only was not a person who had lodged a representation and was consequently entitled to a preference, but to a person who was not within the Act of Parliament at all, as it was not proved that his dwelling-house was in an insanitary state.

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Upon that state of facts a civil bill was brought by Tevlin, claiming damages against the district council for breach of their statutory obligation to provide a plot of land and a cottage for him. It was dismissed by the learned County Court Judge, and an appeal was taken to the last Fermanagh Assizes, where the appeal came on for hearing before me. Necessarily the case was argued there in a rather hurried manner. It was quite impossible to discuss this complicated code of Acts, but roughly the obligation was grounded on the fact of the Local Government Board inspector having allotted the cottage to Tevlin. I had great difficulty in acceding to that argument, as it appeared to me that the body to let these plots was the district council, and that it was outside the function of the Local Government Board inspector to interfere in the selection of the persons to whom cottages should be allotted. I accordingly refused to yield to this contention, but not knowing that there were not other modes in which the case might be put,

on the application of Mr. Henry I stated a case for the opinion of this Court, with a provision that the civil bill was to be treated as amended in any way necessary to show a valid cause of action if such existed.

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The question now before us for determination is whether the facts stated disclose an actionable breach by the defendants of a statutory obligation due by them to the plaintiff. I am of opinion that they do.

The case was argued in the first place on the action of the Local Government Board inspector, and in the next place—and I think at the end of the case, certainly in the reply, principally—upon the 29th sect. of the Act of 1906.

I have considered the question very carefully, and I am quite clear that the selection of labourers for particular cottages is a matter that is altogether outside the jurisdiction of the Local Government Board or their inspector; and I would respectfully suggest that they should consider whether for the future they should not change their practice in this respect. It is hardly necessary to consider the Acts of Parliament in deciding this question, because there is not a single provision that can be relied on as showing that such a right is vested in the Local Government Board. The Acts as far as possible leave this matter to the discretion of the local authority.

The question, therefore, that I proceed to determine is whether, upon the facts of this particular case, Tevlin, being a person who sent in a representation, that representation being one of those upon which the scheme was ultimately founded, was or was not, under the provisions of the 29th sect. of the Labourers (Ireland) Act, 1906, entitled to a preference; and, if he was entitled to a preference, is an action at law maintainable for breach of the statutory obligation upon the district council to give him that preference.

I shall consider the question under four heads.

1. Were the defendants under a statutory obligation?
2. Was it due to a class of which the plaintiff was one?
3. Was there a breach of that obligation?
4. Was that breach under circumstances which rendered it actionable at the suit of the plaintiff here?

K. B. Div. As to the first head, the case turns almost entirely on the
 1913. 29th sect. of the Act of 1906. Sub-sect. 1 of that section
 TEVLIN provides that:—"The district council shall make regulations
 v. with respect to the letting of cottages and allotments under
 LISNASKEA the Labourers Acts, and for preventing any undue preference
 RURAL in the letting thereof, and generally for carrying the provisions
 DISTRICT of the said Acts into effect."
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Sub-sect. 2 provides: "Regulations under this section shall provide that on the first letting of any cottage or allotment comprised in a scheme, preference shall be given to the agricultural labourers who have signed on their own behalf the representation on which the scheme was founded, or on whose behalf that representation was made."

There has been a good deal of controversy as to the true construction of the 2nd sub-sect., but in my opinion it goes far beyond a mere provision as to what the regulations are to contain. I think that the true effect of the two sub-sections was well stated by my brother Madden during the argument; that they give a right, and further provide that that right shall be stated in regulations.

Regulations were not made under this section, but the intention of the Legislature in relation to the subject-matter of sub-sect. 2 depends, not on regulations, but on the statute itself. There was an obligation on the defendants, under sub-sect. 1, to make regulations which, when made, would confer particular defined rights on a particular class of persons. The omission to make those regulations cannot deprive that class of those rights, or, indeed, affect them. If an act is such as to be an actionable invasion of the right the plaintiff would have had if the regulations had been made, so, too, under circumstances such as we have here, must the omission to make the regulations be actionable. Were it otherwise, the freedom of the defendants from liability would rest upon their own wrongful act—a position impossible to maintain.

I hold, therefore, that there was a statutory obligation upon the defendants due to the labourers for whom the representations on which the scheme is founded were made, under the section, to give them the preference.

Was, then, the plaintiff one of the class of persons on whose representation the scheme must be taken to have been founded? I am clearly of opinion that he was. A representation was signed on his behalf, and the scheme was founded on such representation *inter alia*. It is true that the suggestion in this representation as to site was rejected. But, notwithstanding this, the scheme was founded on this representation to the same identical extent as it was founded on the representation sent in on the part of Curry.

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As to the question under the third head, there was the letting of one of the plots to Blake, in defiance of the preference given to the plaintiff and to the others upon whose representation the scheme was founded. It is true that the letting was made before the cottage was built; but such a letting was authorized under sect. 15 of the Act of 1886, and sect. 29, sub-sect. 2, of the Act of 1906 confers a preference on the labourer on whose behalf a representation is made on the first letting of "an allotment," as well as on that of "a cottage." The letting was to a person whose dwelling was not certified to be insanitary.

This disposes of the questions under the first three heads I have mentioned. I am of opinion that there was a statutory obligation on the defendants; that the plaintiff was within the class of persons to whom that statutory obligation was due; and that there was a breach of that statutory obligation.

Thus the sole remaining question is, Is such a breach of the statutory obligation actionable? As to this, it is to be observed that the case is a stronger one than that of the obligation being due to the public generally, with special damage resulting to a member of the public from the breach. It is an obligation to a specified class intended by the statute to be specially benefited—a class, every member of which was ascertainable from the representations made under the statute—representations which must be read into the statute itself—and therefore a class which must be taken to be ascertained by the statute itself just as if their names were stated in the statute. The right each member of that class acquires under the statute is positive, and not negative. The act relied on as a breach is one of commission, not of omission, so that the question which arose in the class

K. B. Div. of cases of which *Cowley v. The Newmarket Local Board* (1)
 1913. is a type does not arise. For breach of such an obligation
TEVLIN I am of opinion an action lies unless some remedy is given
v. by the statute itself, and I am of opinion that no such remedy
LISNASKEA is given by the statute here.
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Section 15 of the Public Health (Ireland) Act, 1896, relied on
Palles, C.B. as affording a remedy, in my opinion does not apply; and for
 two reasons: first, because it is not in terms made applicable;
 and, secondly, because its scope is general, not peculiar, rights.
 The case appears to me to be a typical one of a liability created
 by a statute which provides no special remedy for its breach,
 and in such a case I have always understood the common law
 steps in and affords the remedy incident to a breach of an
 obligation validly created. An obligation created by statute is
 at least as enforceable as if its origin had been by grant.

We have been referred to a number of cases in reference
 to public bodies, in which it has been said that upon the face
 of the entire Act of Parliament it appeared that the Legislature
 did not intend that an action should be brought, and as to this
 I wish to say a word.

The case of *Couch v. Steel* (2) may now be taken to be over-
 ruled. Not only was a strong opinion expressed against it in the
 Exchequer Chamber in *Atkinson v. Newcastle Waterworks Co.* (3),
 but the whole current of authority has been against that decision.
 I should like, however, to go back a little to well-settled principles.
 The law is as old as the time of Lord Coke, that when there is a
 statute imposing an obligation, *prima facie* an action will not lie
 by one of the public who by reason of a breach of the statute has
 been inconvenienced or injured in the same way as others of the
 public. The law in such case provides a remedy by indictment.
 The reason given is, to prevent a multiplicity of actions. I had
 occasion to refer to this in the case of *Cavan County Council v.*
Kane (4). But Lord Coke goes on to say that if any man has a
 particular damage—and he gives the instance of a man and his
 horse falling into a ditch, whereby he receives hurt—there for this

(1) [1892] A. C. 345.

(3) 2 Ex. D. 441.

(2) 3 E. & B. 402.

(4) [1913] 2 I. R. 250, at p. 253.

special damage, which is not common to others, he shall have an action : Co. Lit. 56 (a). K. B. Div.
1913.

There are special classes of cases which I mention only for the purpose of putting them out of the way. Where a special remedy is given by a statute no action will lie. In *Atkinson v. Newcastle Waterworks Co.* (1) there was a statute providing that water should be laid on by the defendants at a certain pressure. There was a breach of that obligation, and the plaintiff's premises were burnt down by reason of a proper supply of water to extinguish the fire not being procurable. It was held that an action did not lie. But why? Because it was held that the statute provided remedies in relation to the matter.

The present case is distinguishable from all the excepted classes of cases. I should like in the first instance to call attention to what I conceive to be the object of the provision we are dealing with. It is not in the interest of the local authority to erect labourers' cottages. As a rule it is an expense to them. The great object of the Legislature throughout this code appears to have been that representations should be made where new dwellings were required. Going back to the Act of 1883, and tracing the statutes down to this Act of 1906, it will be seen that in nearly every one of them they increase the ease with which representations may be made. At first it was requisite that twelve persons should join. The number was afterwards reduced to six by the Irish Land Act, 1903, sect. 97, and finally, by sect. 1, sub-sect. 2, of the Labourers Act of 1906, to three. Further, in this Act of 1906 the Legislature appears to have acted on the principle that to make a person urgent in doing a thing, the best way was to give him a pecuniary interest in it; and I look on this provision in the 29th sect. as an encouragement to labourers to make these representations in cases in which they were required, by giving them a pecuniary interest in the result of them.

We have, then, in this code, intended for the benefit of agricultural labourers, a sub-class of these agricultural labourers singled out as entitled to special favour, that is labourers who have signed representations, or for whom they have been signed.

(1) 2 Ex. D. 441.

TEVLIN
v.
LISNASKEA
RURAL
DISTRICT
COUNCIL.
Palles, C.B.

K. B. Div. In these provisions for labourers we have the genesis of the whole
 1913. code. It was not for the benefit of the local authorities that the
 TEVLIN Acts were passed. As far as it could the Legislature provided
 v. that its views should be carried out, and therefore not merely by
 LISNASKEA regulations to be made, but by positive enactment, there was given
 RURAL that to labourers, on whose behalf representations were made, a
 DISTRICT statutory right of preference when the cottages came to be
 COUNCIL. allocated by the district council.
 Palles, C.B.

I hope that a case of this kind will never come before me again. In refusing to give this plot to Tevlin, the local authority acted in defiance of the Act of Parliament, and, as appears to me, without a shred of justification.

The question submitted for the opinion of the Court ought therefore to be answered in the affirmative.

MADDEN and KENNY, JJ., concurred (1).

Solicitor for the plaintiff: *Henry Murphy*.

Solicitor for the Lisnaskea Rural District Council: *John F. Wray*.

J. G. T.

(1) The Rural District Council served notice of appeal to the Court of Appeal, but subsequently withdrew it, and an order was made by the Court of Appeal on the 3rd December, 1913, striking out the appeal with costs.—[ED.]

IN RE BEHAN, A BANKRUPT (1).

Appeal.
1913.*Bankruptcy — Crown debt — Priority — Bankruptcy (Ireland) Amendment Act, 1872 (35 & 36 Vict. c. 58), s. 47.*

Oct. 27.

The bankrupt had rented from the Postmaster-General a telephone service wire under an agreement by which the rent was payable yearly in advance. One year's rent having accrued due after the adjudication,

Held, that the debt being a Crown debt the Postmaster-General was (subject to the provisions of the Preferential Payments in Bankruptcy (Ireland) Act, 1889) entitled to be paid in full, and was not bound to have the value ascertained and to prove for the same under sect. 47 of the Bankruptcy (Ireland) Amendment Act, 1872 (2).

APPEAL.

A contract for telephone service was, on the 11th November, 1910, entered into between J. L. Behan, the above-named bankrupt, and the National Telephone Company, reserving a yearly rent for a telephone wire, payable in advance. The only condition as to the termination of the said agreement was as follows:—" This contract is a yearly one, . . . but determinable, nevertheless, by either party giving to the other six calendar months' notice in writing expiring on the day previous to the subscription falling due in any year."

(1) Before O'BRIEN, L.C., and HOLMES and CHERRY, L.JJ.

(2) Bankruptcy (Ireland) Amendment Act, 1872 (35 & 36 Vict. c. 58), s. 47: " If any bankrupt, at the time of adjudication, or any arranging debtor, at the time of the presentation of his petition, be liable, by reason of any contract or promise to pay premiums on any policy of insurance, or any other sums of money, whether yearly or otherwise, or to repay or indemnify any person against any such payments, the person entitled to the benefit of such contract or promise may, if he think fit, apply to the Court to set a value upon his interest under such contract or promise, and the Court is hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon."

Appeal. The undertaking of the National Telephone Company was
 1913. subsequently acquired by the Crown, and on the 24th November,
In re 1912, being four days after Behan was adjudicated a bankrupt, a
 BEHAN, sum of £13 7s. became due by him to His Majesty's Postmaster-
 A BANKRUPT. General in respect of rent under the agreement.

By an order of Boyd, J., dated the 6th June, 1913, and made in the above-named matter, it was declared "that the Postmaster-General is entitled to be paid out of the estate in due priority, subject to the provisions of the Preferential Payments in Bankruptcy (Ireland) Act, 1889, the amount of his claim in full as a debt due to the Crown, when same has been ascertained and proved pursuant to sect. 47 of the Bankruptcy (Ireland) Amendment Act, 1872."

The Postmaster-General appealed against so much of this order as required the Crown debt to be ascertained and proved pursuant to sect. 47.

A. W. Samuels, K.C. (with him *A. P. Samuels*), for the Postmaster-General :—

The order should not have been limited by the concluding words. The Crown is, in Ireland, not bound by the Bankruptcy Acts, and this being admittedly a Crown debt, it should be paid in full out of the assets, without being ascertained and proved under section 47 of the Act of 1872. The case is ruled by *In re Niblock* (1). There, no doubt, the whole amount claimed became due under the contract on the subscriber being adjudged bankrupt; but here the liability under the contract continued notwithstanding the adjudication. Under sect. 58 of the Bankruptcy Act of 1872 a certificate of conformity does not release debts due to the Crown. The Crown's prerogative right of prior payment is clearly shown by *Galvin's Case* (2) and by *New South Wales Taxation Commissioners v. Palmer* (3). [He also referred to *Re Corley* (4) and *In re Henley & Co.* (5).]

(1) [1907] 2 I. R. 559.

(4) 23 L. R. I. 249.

(2) [1897] 1 I. R. 520.

(5) 9 Ch. D. 469.

(3) [1907] A. C. 179.

S. L. Brown, K.C., and *Edward FitzGerald*, for the assignees in bankruptcy, contended that as the debt accrued due after the bankruptcy, there was no such Crown debt as would entitle the prerogative of the Crown to be exercised, and that, as a matter of procedure, the Crown was bound to come in under the provisions of sect. 47 of the Act of 1872.

Appeal.
1913.

In re
BEHAN,
A BANKRUPT.

O'BRIEN, C. :—

We will amend the order by striking out the words "when the same has been ascertained and proved pursuant to section 47 of the Bankruptcy (Ireland) Amendment Act, 1872."

Solicitor for the appellant: *E. R. Bate*.

Solicitors for the respondents: *D. & T. FitzGerald*.

R. ST. J. C.

DUFF v. TUITE (1).

K. B. Div
1913.

Solicitor—Costs—Charging order—Property recovered or preserved—Charge upon sum over which client has been appointed receiver by way of equitable execution—Legal Practitioners (Ireland) Act, 1876 (39 & 40 Vict. c. 44), s. 3.

Dec. 4.

Where a plaintiff had recovered judgment against the defendant, and had been appointed receiver by way of equitable execution over so much of a sum due to the defendant by a third party as should be sufficient to discharge the judgment debt and costs, the plaintiff's solicitor was held entitled to an order under sect. 3 of the Legal Practitioners (Ireland) Act, 1876, giving him a charge for his costs on the amount so payable to the plaintiff.

MOTION on behalf of T. J. Gowran, solicitor for the plaintiff, for an order declaring T. J. Gowran entitled to a charge for costs and expenses of the plaintiff in the action upon a sum of £16 15s. 11d. due to the defendant, payable by the Carrickmacross Urban District Council to the plaintiff, as receiver by way of equitable execution, under an order of the Court dated 13th May, 1913, and for the costs of the application. The motion was for the sitting of the Court on notice to the plaintiff and the Carrickmacross Urban District Council.

(1) Before BORD, J.

K. B. Div. The action was instituted by the plaintiff against the defendant
 1913. for the recovery of a sum of £27 2s. 11d., a balance due for
 DUFF work and labour done under an agreement dated the 12th
 v. July, 1907. Judgment was marked for the sum claimed, and for
 TUITE. £5 11s. costs, upon the 26th June, 1911. Execution was issued
 on that judgment, but the sheriff made a return of *nulla bona*.

By an order of the Court, dated 13th May, 1913, the plaintiff, Patrick Duffy, was appointed receiver by way of equitable execution over so much of a sum due or accruing due from the Carrickmacross Urban District Council to the defendant as should be sufficient to discharge the judgment debt and the costs, amounting altogether to £34 15s. 11d. The plaintiff received the sum of £18 on account of the judgment debt and costs, without Mr. Gowran's knowledge, leaving a balance of £16 15s. 11d. due by the defendant. There was a balance of solicitor and client costs due to Mr. Gowran by the plaintiff, and Mr. Gowran, in his affidavit grounding his motion, stated that he believed the plaintiff intended to avoid payment of these costs; and that there were no means of satisfying them unless a lien was given to Mr. Gowran on the sums receivable by the plaintiff under the order of 13th May, 1913. The plaintiff was a building contractor, who had for some time given up work, and who had a small plot of ground in Carrickmacross. A judgment for £27 10s. 10d. and for £5 11s. costs had been registered by Campbell Brothers of Belfast against the plot of ground owned by the plaintiff, and Mr. Gowran stated that he believed proceedings in equity on foot of that registered judgment were about to be taken by Campbell Brothers. On the 18th September, 1913, Mr. Gowran furnished his solicitor and client costs in the matter to the plaintiff, with a requisition to tax, requesting him to sign the requisition, for the purpose of having the costs taxed. The plaintiff had taken no notice of the application, and had not signed the requisition.

R. J. Kinahan, for T. J. Gowran, referred to 39 & 40 Vict. c. 44, sect. 3; *M'Alaery v. M'Alaery* (1); *Johnston v. M'Kenzie* (2).

There was no appearance for the plaintiff, or for the Carrickmacross Urban District Council.

The Court made the following order :—

“Ordered, that the said T. J. Gowran, as solicitor for the plaintiff in this action, do have a charge upon the said sum of £16 15s. 11d., payable to the plaintiff as aforesaid by the Carrickmacross Urban District Council under the said Order herein dated the 23rd day of May, 1913, for his costs, charges, and expenses of and in reference to this action, and also his costs of this motion, to which the said T. J. Gowran is hereby declared entitled.

“It is further ordered that it be referred to the proper officer to tax the said costs, charges, and expenses, including the said costs of this motion. This order to be forthwith served upon the said plaintiff and the said Carrickmacross Urban District Council.”

Solicitor for the applicant : The applicant himself.

C. N. K.

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1913

DUFF

v.

TUTE.

THE MAYOR, ALDERMEN, AND CITIZENS OF THE CITY
OF LIMERICK *v.* KENNEDY (1).

K. B. Div.

1913.

Nov. 19.

Rating—County Borough—General Purposes Rate—Premises used exclusively for public purposes—Half-rents—Limerick Improvement Act, 1853 (16 & 17 Vict. c. xciv), ss. 37 and 39—Valuation (Ireland) Act, 1852 (15 & 16 Vict. c. 63), ss. 12, 26, and 27—Grand Jury (Ireland) Act, 1856 (19 & 20 Vict. c. 63), s. 2.

By the Limerick Improvement Act, 1853 (16 & 17 Vict. c. xciv), s. 37, all the powers theretofore exercised by or vested in the Grand Jury of the city of Limerick with respect to the presenting and levying of rates or cesses for local purposes within the borough of Limerick, were transferred to the council of the said borough ; and, by sect. 39, the borough council were authorized to raise and levy a general purposes rate to make provision for all such purposes as, but for the Act, the grand jury would be empowered and bound to provide for out of the rates or cesses they were empowered to levy within the borough.

Sect. 12 of the Valuation (Ireland) Act, 1852, includes half-rents among rateable hereditaments for the purposes of the Act ; and sect. 26 enacts that all county or grand jury rates and assessments shall be levied according to the valuations in the final lists of rateable hereditaments made under the Act. Sect. 2 of the Grand Jury (Ireland) Act, 1856, enacts that half rents shall be liable to grand jury rates and county cess.

(1) Before GIBSON and MADDEN, JJ.

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D

K. B. Div. The borough council sought to make and assess the general purposes rate
 1913. on half-rents received out of premises let and used exclusively for public
 LIMERICK purposes.
 CORPORATION

v. *Held*, that grand jury cess could not have been assessed on half rents in
 KENNEDY. 1853, and therefore the Limerick Corporation, as the transferees of the
 powers of the grand jury, could not assess the general purposes rate on half-
 rents; that the Valuation (Ireland) Act, 1852, merely supplied the machinery
 of rating, and was not a taxing statute; and that, moreover, the words of
 sect. 2 of the Grand Jury (Ireland) Act, 1856, were tantamount to a
 declaration that prior to the passing of that Act half-rents were not liable
 to grand jury cess.

CASE STATED for the opinion of the King's Bench Division
 by Cherry, L.J., on the hearing before him at the Summer
 Assizes, 1913, for the county of the city of Limerick, of an appeal
 from a decree of the County Court Judge.

The civil bill was brought to recover the sum of £7 2s. 5d.,
 being for a general purposes rate made and assessed by the
 plaintiffs for the spring and summer levies of 1912 on the half
 annual rent received by the defendant out of certain houses
 situated at St. Joseph Street in the city of Limerick, in the
 occupation of the military authorities.

The civil bill was heard by the County Court Judge of
 Limerick at the sessions held at Limerick on June 5th, 1913, and
 he gave a decree for the sum claimed with costs.

The defendant appealed, and the appeal came on for hearing
 before Cherry, L.J., at Limerick at the Summer Assizes, 1913.

The houses and premises in respect of which the rate was
 claimed consisted of two blocks of five houses, each let by the defen-
 dant to His Majesty's Principal Secretary of State for ever, at the
 yearly rent of £97. The houses and premises were used as
 quarters for married soldiers.

The general purposes rate was raised and levied under
 sects. 37 and 39 of the Limerick Improvement Act, 1853 (1).

(1) Sections 37 and 39 of the Limerick Improvement Act, 1853 (16 & 17 Vict.
 c. cxciv), provide as follows:—

§ Sect. 37. "From and after the commencement of this Act all the powers,
 rights, and duties of the Grand Jury of the county of the city of Limerick, in
 relation to the appointment of Presentment Sessions, and the presenting and
 levying of rates and cesses for any purpose, shall cease and determine within the

The defendant was rated for said general purposes rate for the spring and summer levies for the financial year 1912-13 on the half annual rent of £48 10s. for each block, received by him for the said houses and premises. Each block was described in the valuation list for the year in question, in the column headed "occupier," as exempt, and in the column headed "description of tenement" as "Five houses and yards; married soldiers' quarters"; "half annual rent, married soldiers' quarters."

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1913.
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The question submitted for the decision of the Court was:—
"Whether the said half rents were liable to the said general purposes rate?" If the question was answered in the affirmative, the decree was to be affirmed with costs in the Court below and costs of appeal. If the question was answered in the negative, the decree was to be reversed with costs in the Court below and costs of appeal.

Phelps, for the defendant:—

The Limerick Improvement Act, 1853, by sect. 37, does away with the grand jury in the city of Limerick; and confers upon

said borough from the time aforesaid; and all the powers theretofore exercised by or vested in the said Grand Jury with respect to the presenting and levying of rates or cesses for local purposes within the borough of Limerick shall be transferred to and be solely exercised by the council of the said borough, and all things by any Act theretofore authorized or required to be done by the said Grand Jury of the county of the city, with respect to the said fiscal matters, rates, or cesses, shall, save as by this Act altered, be done by the said council."

Sect. 39. "The mayor, aldermen, and burgesses shall, at the times and in the manner herein-after mentioned, proceed to raise and levy off the borough, by means of the rate for general purposes hereinafter specially provided, such sums of money as shall be required in order to make provision for all such purposes as but for the passing of this Act the said Grand Jury, with or without previous application to Presentment Sessions, would be bound or empowered to make, or might lawfully have made provision for out of the rates or cesses which they were empowered to raise or levy within the said borough: Provided always, that in no case shall the said rate for general purposes be applicable to the making, enlarging, repairing, or paving any street, road, or passage within the borough."

Sect. 57 incorporates the Towns Improvement Clauses Act, 1847, with certain exceptions not material to the present case.

K. B. Div. the corporation all the powers theretofore exercised by the grand jury. The grand jury cess is abolished, and by sect. 39 a new rate, namely, "the general purposes rate," is substituted for practically all the purposes of the grand jury cess. This "general purposes rate" is to be raised "in the manner hereinafter provided," that is, "the manner," is to be found in sect. 57 of the Act. Sect. 57 incorporates the provisions as to making rates contained in the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34). In sect. 167 of the latter Act the hereditaments, in respect of which a rate struck under the Act is assessable, are enumerated. It is established by the decision in *Redington v. Millar* (1) that such a rate can only be assessed in respect of premises capable of physical occupation. The owner of a half-rent, therefore, cannot be assessed to the general purposes rate in respect of half-rent: see also *Shillington v. Montgomery* (2) and *Ennis Town Commissioners v. Macbeth* (3) decided under the Towns Improvement (Ireland) Act, 1854.

If, however, this contention is wrong, and the general purposes rate is still to be levied in the same way as the grand jury cess, even then the rate cannot be assessed in respect of half-rents, inasmuch as grand jury cess at the time of the passing of the Limerick Act of 1853 was not so assessable. Grand jury cess first became payable in respect of half-rents by virtue of the Grand Jury (Ireland) Act, 1856 (19 & 20 Vict. c. 63), s. 2. The defendant, therefore, is not liable.

P. Kelly (with him *Ronan, K.C.*), for the plaintiffs:—

If the general purposes rate were a rate created for the first time by the Limerick Improvement Act, 1853, the plaintiffs could not succeed. We submit that the general purposes rate is grand jury cess under an *alias*. The words in the preamble of the Limerick Act:—"And whereas it is expedient that the powers of presenting and levying rates or cesses for divers local purposes now vested in the Grand Jury of the county of the city of Limerick, should be exercised by the mayor, aldermen, and burgesses of the borough," &c., recognized existing rates. Therefore all the

(1) 24 L. R. Ir. 65.

(2) [1897] 2 I. R. 598.

(3) [1897] 2 I. R. 552.

powers of the grand jury were, without diminution, transferred to the corporation. By the force of 9 & 10 Vict. c. 110, ss. 2, 9, and 71, half-rents were made liable to grand jury cess; and although that Act is repealed by the Valuation (Ireland) Act, 1852 (15 & 16 Vict. c. 63), sect. 3, the latter Act, by sects. 12 and 26, makes half-rents liable to the grand jury cess; and that Act being prior to the special Act, which came into operation on December 1st, 1853, all these powers were transferred to the corporation under their Act of 1853. The provisions of the local Act with regard to the general purposes rate are inconsistent with sect. 167 of the Towns Improvement Clauses Act, 1847; by the local Act rates or cesses within the borough have to be levied "twice in every year"; while under section 167 of the Act of 1847 every rate shall be made and levied at "yearly, half-yearly, or such other periods," as the commissioners think fit. Therefore sect. 167 of the Towns Improvement Clauses Act, 1847, incorporated by the local Act in so far as it is not repugnant thereto, does not apply to the general purposes rate.

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Phelps, in reply :—

The Valuation Acts are not taxing Acts. Section 12 of the Valuation Act, 1852, declares that certain hereditaments are to be included in the lists of valuation; sect. 27 clearly shows that, although a hereditament is included in the valuation lists, it is not the subject-matter of any particular rate unless the body seeking to impose the rate can show a statutory or other authority to impose the rate on the particular hereditament. The corporation have failed to produce any authority enabling them to impose the general purposes rate on half-rents.

GIBSON, J.:—

There are only two questions for decision; if either of these is determined in favour of the defendant, he must succeed.

The action is brought to determine whether or not, under their private Act of 1853, the Corporation of Limerick are entitled, as successors of the grand jury, to charge the defendant the general purposes rate in respect of half the annual rent received by him

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out of Government property, not itself rateable. The main argument on behalf of the defendant is that up to 1853 the grand jury, the predecessors of the Corporation, were never authorized to tax half-rents; and, therefore, the Corporation, as their transferees, can be in no better position.

Mr. Phelps's second argument is that, even assuming that it was competent for the grand jury to impose a rate in respect of half-rents, still under the special terms of the Limerick Act the new rate is not the same as county cess; that section 57 of the special Act, which incorporates the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), shows that only corporeal hereditaments, capable of occupation, were within the contemplation of the Legislature; and that, whatever were the powers of the grand jury, those powers, in the hands of the Corporation, could not be so exercised as to reach half-rents. I shall first deal with the primary and more important argument.

It is admitted by Mr. Kelly that if he cannot show that in 1853 grand jury cess could have been assessed on half-rents, he must fail. Were half-rents liable to grand jury cess in 1853? Mr. Kelly, in his lucid and admirable argument, referred to some earlier statutes which do not require notice. The substantial legislation in force in 1853, on which he relies, was the Valuation (Ireland) Act, 1852, sects. 12 and 26.

Section 12, following to some extent the language of the Poor Relief (Ireland) Act, 1838, 1 & 2 Vict. c. 56, sect. 63, says:—"The following hereditaments shall be deemed to be the rateable hereditaments"—these are the only rateable hereditaments. It proceeds to enumerate the several hereditaments, including incorporeal hereditaments, such as tolls, and it expressly includes half-rents, such as the rents at present received by the defendant. It could not have been intended under sect. 12 to effect a fundamental change in county-cess law. County cess was only chargeable against occupiers, or owners in the event of occupiers refusing to pay. It was chargeable upon premises, but it was not charged upon tolls or incorporeal hereditaments, and if Mr. Kelly's argument be well founded, that everything in sect. 12 was the subject of county cess, a sweeping alteration would have been made by the Valuation Act of 1852.

In my opinion sect. 12 does no more than this: it declares that certain hereditaments are to be subject to rating, and no other hereditaments; but in order to find out whether any particular person is to be, in fact, charged, you must ascertain whether there is any enactment making him liable. The Valuation Act supplies the machinery of rating, but does not itself tax.

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Gibson, J.

In 1852, when this statute was passed, county cesspayers were not liable in respect of half-rents, or in respect of tolls. What sect. 26 says is that all county cess is to be levied according to the lists; but it does not enact that all persons possessing property in such lists are to be rated. Their liability must be ascertained from independent statutes.

Section 27 provides that every rate for the relief of the destitute poor made by a town council "shall be made upon the hereditaments and tenements liable thereto, according to the valuation of each hereditament or tenement comprised in such lists." The words "liable thereto" are, I think, implied in sect. 26; any other construction would make a radical change in the then liability in respect of county cess.

But an argument almost decisive in favour of Mr. Phelps is found in the Act 19 & 20 Vict. c. 63, the first section of which is not unlike sect. 26 of the Valuation Act, 1852. Sect. 2, an enacting not a declaratory section, makes half-rents liable to the payment of grand jury rates and county cess. This is, apparently, according to the ordinary rules for the construction of statutes, a declaration that up to that date half-rent was not rateable. Mr. Kelly's answer is that sect. 2 was only introduced *ex abundanti cautela*. It is not, however, for this Court, without the clearest reason, to deprive the language of the Legislature of all effective meaning.

Upon the first point, therefore, I have arrived at the conclusion that in 1853, when the Limerick Act was passed, the grand jury possessed no capacity to impose grand jury cess in respect of half-rent. The Corporation admittedly can have no more extensive powers.

The second point does not, therefore, arise. Supposing the grand jury had the power to impose cess on half rent, the special Act purports to make the Corporation the successors of the grand jury, with identical powers, so that you would expect Parliament

K. B. Div. would have entrusted the Corporation with the same means for
1913. charging municipal rate as previously applied to county cess.
LIMERICK CORPORATION Mr. Phelps contends, however, that the municipal rate is a new
v. rate, not identical with county cess, and that the method of
KENNEDY. collection and assessment is that created by sect. 167 of the
Gibson, J. statute of 1847. His argument is not without weight. Still I
should be unwilling, if it could be avoided, in legislation of this
character, to deprive the Corporation of the power previously
possessed by the grand jury. I do not say Mr. Phelps's
contention may not be correct; but I do not express any final
opinion upon it.

On the first point the Corporation must fail, but I regret this
result. Since 19 & 20 Vict. c. 63 was passed, it is obvious that the
defendant ought to be taxed. Unfortunately, the Limerick
Corporation Act was several years earlier. If it were after
19 & 20 Vict. c. 63, our decision might possibly be different;
but the defendant, under the special legislation before us, is
entitled to succeed.

We must answer the question in defendant's favour, and the
decision of the learned County Court Judge must be reversed.

MADDEN, J., concurred.

Solicitor for the plaintiffs: *J. Dundon.*

Solicitor for the defendant: *J. Doyle.*

C. L.

O'NEILL v. DROHAN AND THE WATERFORD COUNTY K. B. Div.
COUNCIL (1).
1913.

Nov. 12, 13.

*Local government—Rates—County Council—Invalid rate—Illegal seizure—
Liability of rate collector—Master and servant—Liability of county council
for acts of rate collector.*

A rate collector who, in accordance with the terms of his warrant, carries out in a legal manner a seizure in respect of a rate which is bad, is liable to an action for damages.

In such a case the county council is not liable to an action for damages in respect of the act of the rate collector.

MOTION FOR JUDGMENT.

Action for illegal seizure by the defendant John J. Drohan, who was a rate collector under the co-defendants, the Waterford County Council. It was admitted that the rate in respect of which the seizure was made, being made upon a previous occupier, who was dead at the time of the striking of the rate, was illegal. It was also admitted that no rates had been paid in respect of the premises during the period, and there was no evidence of any illegality in the *manner* in which the seizure was carried out by the defendant Drohan, who acted in accordance with the terms of his general warrant, which was in the ordinary form 50 in the Schedule to the Public Bodies Order, 1904, given in Vanston's Local Government, vol. ii, p. 1705. The defendant Drohan was not shown to have been in any way privy to the error in making the rate.

At the close of the trial before Boyd, J., evidence of the seizure having been given, counsel for the defendant Drohan handed in the following requisition:—

“Respectfully requests your Lordship to direct the jury that, as the defendant John J. Drohan, at the time of the trespass in the statement of claim alleged, was discharging a duty imposed on

(1) Before MADDEN and KENNY, JJ.

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him by statute, the duty of collecting the rate made by the defendants, the County Council of Waterford, he is under no liability for acts done by him within the scope of his employment when carrying out that duty."

Counsel on behalf of the defendants the Waterford County Council, handed in the following requisition :—

"Counsel for defendants asks the Judge to direct the jury to find a verdict for the defendants the Waterford County Council, upon the grounds following :—1. That there is no evidence of any illegal act on the part of these defendants. 2. That the defendant Drohan is not the servant of these defendants. 3. That the acts of the defendant Drohan, in making the seizure complained of, were not within the scope of his employment as servant of these defendants. 4. That the defendant Drohan is an independent officer having statutory duties, and that these defendants are not liable for wrongful acts of his."

Boyd, J., reserved the question of law for the Divisional Court, and got the jury to assess damages on the basis of the seizure having been illegal. They assessed damages at £30.

P. D. Fleming, K.C., Norwood, K.C., and Arthur Coughlan, for the plaintiff :—

It was only by sect. 12 of 25 & 26 Vict. c. 83 that the guardians obtained power to make a subsequent occupier liable. Here the county council did not comply with this section, and could make no person liable. The poor-rate collector is liable, and the county council is as much liable for his wrongful acts as if it were a private individual. The rate collector acts under his warrant, but if he commits a trespass he is liable. Here neither the occupier nor the premises were liable. It is the county council who make the rate; the rate collector's only duty is to collect it. The county council is liable for all acts committed by him in collecting it. A municipal body has the same liability as a private individual: *Mersey Docks and Harbour Board Trustees v. Gibbs* (1). If the rate had been valid, the collector could have collected it from the person in occupation. The rate collector has to take the rate-book as he finds it.

(1) L. R. 1 H. L. 93.

H. D. Conner, K.C., and Timothy Sullivan, for the Waterford K. B. Div.
County Council:— 1913.

Poor-rate collectors have been in existence since 1838, and neither poor law guardians nor county councils have ever been made liable for their acts. The liability of bodies created by statute must be determined by the statutes creating them: *Southampton and Itchin Bridge Company v. Southampton Local Board* (1), approved of by Lord Blackburn in *Mersey Docks Case* (2), and by FitzGibbon, L.J., in *Dunbar v. Guardians of Ardee Union* (3). Here all the statutes show that the office is an independent office. [They referred to sections 31, 32, 33, and 73 of 1 & 2 Vict. c. 56, and 25 & 26 Vict. c. 83, s. 13.] The poor-rate collectors were originally the same persons as collectors of county cess, whose powers were defined by sects. 151 and 152 of the Grand Jury Act, 1836, as amended by 19 & 20 Vict. c. 63, and no one ever suggested that any person but the collector could be liable. He distrained in his own name, and went before the justices for orders in his own name: *County Council of Clare v. M'Inerney* (4). Since the Local Government Acts, and under the orders now in force, the collectors are even more independent of the county council. [They referred to Local Government (Ireland) Act, 1898, sect. 83, sub-s. 5, and sect. 115, sub-ss. 10, 18; County Poor rate Collectors Order, 17th April, 1899, Articles 4 and 13; Public Bodies Order, 1904, Articles 82 to 93.] Collectors are practically under the control of the Local Government Board, and are not removable by the council.

Poor law guardians act ministerially, and are not liable for negligence of their subordinates: *Brennan v. Limerick Guardians* (5); *Dunbar v. Ardee Union* (6); *Tozeland v. Guardians of West Ham* (7). *Doran v. Waterford Guardians* (8) is practically overruled by *Murphy v. Enniscorthy Union* (9), a decision of the Court of Appeal.

The county council are not to blame in any way. They have

(1) 8 E. & B. 801.

(2) L. R. 1. H. L., at p. 104.

(3) [1897] 2 I. R., at p. 84.

(4) 35 I. L. T. R. 158.

(5) 2 L. R. Ir. 42.

(6) [1897] 2 I. R. 76.

(7) [1907] 1 K. B. 920.

(8) 37 I. L. T. R. 158.

(9) [1908] 2 I. R. 609.

K. B. Div. no option as to striking the rate; it must be according to the list
 1913. sent them by the Commissioner of Valuation: *Queen v. Commis-*
O'NEILL sioner of Valuation (1); Valuation (Ireland) Act, 1852 (15 & 16
v. Vict. c. 63), sects. 17, 18, 19, 25, and 27; Valuation (Ireland) Act,
DROHAN AND WATERFORD 1854 (17 & 18 Vict. c. 8), sect. 4.
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Further, the collector is in no sense a servant: *Crisp v. Thomas* (2). The cases are collected in *In re National Insurance Act* (3), where O'Connor, M.R., held that officers of a poor law union are not servants, and the same principle applies here.

M'Elligot, K.C., and *Arthur Clery*, for the defendant Drohan:—

Drohan was bound by statute to perform certain duties. He had no option but to accept the validity of the warrant. If he carried out what was in his warrant legally, he is protected. Judicial officers are protected in carrying out an invalid order, and, in principle, there is no difference between their position and that of a rate collector carrying out the duties imposed on him by statute. [Kenny, J.—He has to show us some sort of warrant for going into the premises.] He has no option but to collect the rate. He comes within the principle of *The Mayor of London v. Cox* (4), *per Willes, J.* He is protected in carrying out a statutory duty.

Norwood, K.C., for the plaintiff, in reply:—

In Dunbar v. Ardee Union (5), and the *Mersey Docks and Harbour Board Trustees v. Gibbs* (6), the negligent act was the act of the subordinate. Here the county council were themselves negligent.

Either the Local Government Board, or the county council with their sanction, can dismiss a rate collector. The rate collector is the paid official of the county council, and the council is liable for all acts done by them.

Cur. adv. vult.

Dec. 1.

MADDEN, J. :—

In this case the plaintiff claims damages for trespass to his house and premises, and for the illegal seizure and conversion of

(1) [1901] 2 I. R. 215, at p. 231.

(2) 63 L. T. 766.

(3) [1913] 2 I. R. 244.

(4) L. R. 2 H. L. 239, at p. 269.

(5) [1897] 2 I. R. 76.

(6) L. R. 1 H. L. 93.

his goods. The entry on the house and the seizure of the goods were the act of the defendant John Drohan, done by him as collector of poor rate under the authority of a warrant issued to him as such collector under the seal of the defendants the county council of the County of Waterford. The fact that Drohan was collector of poor rate, and the issuing to him of the warrant, the form of which will be found in the Schedule to the Public Bodies Orders Act, 1904 (No. 50), are not in issue in this action.

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The action is brought against Drohan, by whom the acts complained of were in fact done, and also against the county council, on the ground that they are responsible for acts done by Drohan, who, it is alleged, is their servant, as rate collector, within the scope of his authority under the warrant.

Both defendants justify the entering of the plaintiff's premises, and the seizure of his goods, on the ground that he was the occupier of premises rated to the relief of the poor under the Irish Poor Relief Act, that he was in arrear for one moiety of the poor rate struck for the year 1912, and that the defendant Drohan, lawfully acting under the authority of his warrant, levied a distress for the poor rate so in arrear on the plaintiff's goods and chattels on the said premises.

At the trial the jury assessed damages at £30, the Judge leaving the question of law as to the liability of the defendants, respectively, to be determined by this Court. The case comes before us on a motion on the part of the plaintiff for judgment, to which he claims to be entitled against each of the defendants on the evidence given on the part of the plaintiff. No evidence was given on the other side.

The first question to be decided is the legality of the assessment of the rate in respect of which the seizure was made. It appears from the evidence given on behalf of the plaintiff, which was uncontradicted, that the house in question was unoccupied when the rate was struck. It had been for three years in the occupation of one Illingworth, who died on the 31st of May, 1910. He was succeeded in occupation by William Duggan, whose occupation determined in the month of July, 1911. The distress was made on the 13th of September, 1912, for the first moiety of the rate struck in the month of May in that year.

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The premises, which were then empty, were described as being in the possession of Illingworth, who had died two years previously. The rating was, therefore, absolutely void. The authorities which established the proposition that non-occupation invalidates a rate are fully stated and examined in the judgment of Gibson, J., in *Guardians of New Ross Union v. Byrne* (1). Where a rate is struck in respect of unoccupied premises there was, prior to the passing of the Poor Relief (Ireland) Act, 1862, no procedure by which a person entering into occupation, subsequently to the making of the rate, and during the year for which it was struck, could be made liable for poor rate. By the 12th section of that Act the guardians are empowered to include an unoccupied building in the rate, describing the building as "empty," with the result that the building is deemed to be rated as effectually as if it had been occupied, and the name of the occupier inserted in the rate. If the building should remain unoccupied for the whole of the period for which the rate was struck, the rate would not be recoverable; but a person subsequently entering into possession during this period is rendered liable for a part of the rate proportioned to the time of his occupation. If, in striking the rate in May, 1912, the house had been described as "empty," the plaintiff could have been made liable for an apportioned part of the rate. But, as this course was not taken, the rate for which the distress was made was void, and the justification pleaded by the defendants has not been sustained in proof.

An alternative defence has been pleaded by the county council which raises a question of general importance. The plaintiff seeks to make the county council responsible for the tortious act of Drohan, on the ground that it was an act done by him as the servant of the county council, within the scope of his authority under the warrant issued to him as rate collector. The county council deny that Drohan was their servant or agent, and also that the acts complained of were within the scope of his employment.

The appointment and dismissal of poor-rate collectors, their

qualifications and duties, are now governed by the Public Bodies Order of 1904. The rate which they collect represents the poor-rate established by the Poor Relief (Ireland) Act of 1838, and also the grand jury cess. On the establishment of the poor-law system the collectors of grand jury cess were made use of, as far as possible, for the collection of the new poor-rate. By the 73rd section of 1 & 2 Vict. c. 56, the rate established by the Act was to be collected by the collector of grand jury cess, if approved of by the Poor Law Commissioners, on giving security and accepting the approved salary or allowance. If there should be no collector of cess satisfying the requirements of the statute, the warrant for the collection of the poor-rate might be made by any other officer of the union appointed with the approval of the commissioners and authorized by the warrant of the guardians. The officer so appointed and authorized is given the same powers in regard to the poor-rate as were given to the cess collectors.

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Such was the system of collection in existence when the functions of the grand juries and boards of guardians in regard to the collection and application of county cess and poor-rate were vested in the county councils. By sect. 115 of the Local Government Act of 1898, each county council was bound, within six weeks after their first meeting, to submit to the Local Government Board a scheme setting forth their arrangements for the collection of the poor-rate, and the officers they proposed to employ for this purpose. The section enumerates the different classes of officials who were employed in the collection of poor-rate or county cess, and who were to be included in the scheme. This scheme was to be the basis for the collection of the consolidated rate established by the statute. Thenceforth the collectors of this poor-rate were to be appointed by the county council, and the mode of appointment and the nature and tenure of the office were prescribed by the County (Poor-Rate Collectors) Order of the 17th April, 1899. The provisions of this order, so far as they are material for the purpose of the present case, are embodied in the Public Bodies Order of 1904. By the 82nd Article of this order every county council is bound to appoint from time to time such persons as they may deem expedient to collect the poor-rate in their district, described

K. B. Div. as collectors of poor-rate. The appointment is made by the county
 1913. council, subject to the approval of the Local Government Board.
O'NEILL The collectors so appointed are to perform the duties required of
v. them "in such manner as shall be prescribed by this or any other
DROHAN AND general order of the Local Government Board for the time being
WATERFORD in force, or by any order which may be made by the Local
Co. COUNCIL. Government Board from time to time affecting any particular . . .
 county or urban district or collection district or districts" (Article 83). The amount of the security given by the collector is to be subject to the approval of the Local Government Board, and the security of a company or society cannot be accepted unless approved of by the Local Government Board (Article 87).

The 88th article provides that "every collector of poor-rate shall, subject to the provisions of article 89 of this Order, continue to hold office until he die or resign, or be removed by the Local Government Board, or by the council with the consent of that Board, and every such death, resignation, or removal by the council shall be forthwith reported to the Local Government Board." The 89th article gives the council power to suspend a collector from the discharge of his duties. The suspension is to be reported to the Board, who may either remove the suspension, or decide not to remove it, in which latter event the collector ceases to hold office from the date of the order of the Board by which this decision is declared. The remuneration of the collector is by "such poundage rate as the council, with the approval of the Local Government Board, shall have fixed" (Art. 91). The appointment of a substitute to act during the illness of the collector requires the consent of the Board (Art. 94).

The collection of the rates is under the control and supervision of the Board, to whom monthly returns are to be furnished by the secretary or clerk of the council, showing the state of the collection (Art. 102). The treatment of rates as irrecoverable and the allowance of a refund to the collector require the approval of the Board (Art. 92). The collector must "keep all books required to be kept by the orders of the Local Government Board" (Article 93).

Thus it appears that the collectors of rates are not appointed by the county council on its own responsibility, and that the

council has no power to dismiss a collector without the consent of the Local Government Board. The nature of their duties and the scope of their authority, except so far as they result from the provisions of the statute law applicable to the office, are to be prescribed by order of the Board. The amount of their remuneration is subject to the approval of the Board, and the collection of rates is carried out under its control and supervision. There is, in the relation of the collectors of rates to the county council, an entire absence of the elements which are the foundation of the principle of law by which masters are held responsible for acts done by servants, whom they have selected for the discharge of duties entrusted to them, and whom they could have dismissed from employment if they had thought fit to do so.

It was decided by the Master of the Rolls that the officers of a poor law union are not employed under a contract of service within the meaning of Part I of the first schedule of the National Insurance Act, 1911: *In re National Insurance Act (Officers of South Dublin Union)* (1). Although the question there decided is not the same as that involved in the present case, the judgment of the Master of the Rolls, and his examination of the statutes to which I have referred, are of assistance. It is consistent with the decision in that case that officers employed by a county council in the administration of the Poor Law Acts, although not employed under a contract of service within the meaning of the Insurance Act, may occupy the position of servants so as to render the county council responsible for their tortious acts. The difference between such a relationship and that in the present case is illustrated by the case of *Doran v. Guardians of the Waterford Union* (2). This was an action brought against the guardians for assaults committed by the porter, assistant-master, and wardmaster of the union workhouse. The grounds of the decision of this court are stated by Andrews, J., who held that the porter, assistant-master, and wardmaster were servants of the guardians, and that the guardians were their masters, by whom they were appointed and paid, and could be dismissed. In that case the responsibility of the guardians

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(1) [1913] 1 I. R. 244.

(2) 37 Ir. L. T. R. 153.



K. B. Div. was founded on the existence, in the relation between them and
 1913. the officers in question, of the elements which are, as I have
O'NEILL pointed out, absent from the relation of the rate collectors to the
v. county council.

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The result is that the action is dismissed against the county council with costs. Drohan's plea of justification having failed, the plaintiff is entitled to judgment against him for the £30, the amount of damages assessed by the jury, with costs. It was essential to the plea of justification to establish that the seizure was made under a rate lawfully struck. The uncontradicted evidence not only fails to support this proposition, but proves conclusively that the rate was invalid, inasmuch as the house was unoccupied at the time when the rate was struck.

It has been stated, and correctly stated, that the unlawfulness of Drohan's action was due not to any misconduct on his part, but to the illegal action of the county council in striking an invalid rate. This Court is concerned only with the question of legal responsibility. The county council have succeeded in establishing their legal rights, and other matters must be left for arrangement between them and the official who acted under their warrant in effecting this distress.

KENNY, J.:

This case stands in a peculiar position. It is an action for trespass against two defendants which was tried with a jury, but in which there were no questions submitted to the jury even as to damages, and consequently we have no findings of fact save a general verdict for the plaintiff for a sum of £30. In dealing with the present motion for judgment, we are, however, relieved from difficulty arising from the absence of specific findings by the admission practically made by the defendant Drohan, that at the date of the assessment of the rate in respect of which the distress was levied the premises on which the assessment was made were as a matter of fact unoccupied.

The defendants are the county council of the Co. of Waterford, and one of the rate collectors of the county, who on the 13th September, 1912, entered the rated premises and there purported

to make a distress for the first moiety of the poor-rate that had been assessed on the 21st May, 1912. It is admitted that that assessment was made on the basis of the premises being then occupied, whereas, according to a further admission, they were then unoccupied. The plaintiff did not come into occupation until the 6th August, 1912, when he took the house for six weeks.

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Neither the rate-book nor the warrant issued to the defendant Drohan for the collection of the rates is in evidence. We have to assume that the rate-book treats the house as occupied and purports to rate a named occupier; and we have also to assume that the warrant from the county council to the defendant Drohan is in the ordinary form as provided in the schedule to the Local Government Board Order of 17th December, 1904 (1).

The questions arising for our consideration are:—1. Whether the defendants, the county council, are responsible for tortious acts of their rate collector done in the course of his duty as collector. 2. Whether the latter is liable for damages in making a distress for a rate assessed under the circumstances admitted in this case.

I entertain no doubt that the county council cannot be held liable for the acts of the rate collector whether the rate be good or bad and whether the rate collector be personally liable or not. The onus of showing liability on the part of the council for his acts lies upon the plaintiff; and the contention in favour of liability rests solely on the fact that he is the rate collector of the council. Although no rate-book is in evidence, and no proof of Drohan being the rate collector has been given, counsel for the county council has argued the case on the assumption that Drohan is the rate collector, and that he levied the distress in respect of the rate made on the 21st May, 1912. There is no evidence of any authority to Drohan save the statutory one pursuant to the Poor Relief (Ireland) Act, 1838, sects. 61, 71, and 73; the Grand Jury Act, 1836, sect. 152; the County (Poor Rate Collectors) Order, 1899, Article 13; and the Local Government Board Order of 17th December, 1904, Article 90. That

K. B. Dw. authority is in substance one entitling the collector to levy by
 1913. distress and sale the rates mentioned in the warrant issued to him
O'NEILL by the county council; but he cannot, in my opinion, be regarded
v. as the servant or agent of the county council in making such levy.
DROHAN AND The collectors occupy a position not indeed wholly independent of
WATERFORD the county council, but very largely so. They are appointed by the
Co. Council. county council, but the appointment is subject to the approval of
 the Local Government Board;—they are to perform their duties in
 such manner as may be prescribed by the Local Government
 Board;—they are remunerated by a poundage rate; the county
 council may suspend them, but cannot dismiss them; and they are
 to hold office (subject to such liability to suspension) until they
 die, resign, or be removed or dismissed by the Local Government
 Board (1). It is to them and not to the county council is given
 the power to levy the rates by distress and sale. These attributes
 of the collectors' office are inconsistent with their being servants
 or agents of the county council.

A number of authorities have been cited on this branch of the case, but it is only necessary for me to refer to *Brennan v. The Guardians of the Limerick Union* (2), and *Dunbar v. The Guardians of the Ardee Union* (3), both of which were approved of and followed in *Tozeland v. Guardians of West Ham* (4). They establish that in circumstances not at all so strong as those in the case of a rate collector, the official, having been properly appointed by the guardians, acts ministerially in the performance of his duties,—that his acts and defaults are not those of the guardians, and that the doctrine of “*respondeat superior*” does not apply. I therefore think there is no ground for holding the county council liable in the present case to the plaintiff. At the same time I offer no opinion as to whether, having regard to the fact that this rate must be regarded as being included in Drohan's warrant, there is any obligation on the county council to indemnify him if he be held liable for an illegal distress.

In considering the second question we have to assume it to be established that when the rate was struck the premises

(1) L. G. Act, sect. 83, sub-s. 5;
 County (Poor Rate Collectors) Order,
 17th April, 1899.

(2) 2 L. R. Ir. 42.

(3) [1897] 2 I. R. 76.

(4) [1907] 1 K. B. 920.

were really unoccupied. They were erroneously treated as *K. B. Div.* being occupied, and the rate was struck on that basis. If the 1913.
county council had known when striking the rate that the O'NEILL
premises were unoccupied, they should have returned them as v.
"empty," and the premises would have been deemed to be rated DROHAN AND
as fully and effectually as if they had been occupied at the time WATERFORD
the rate was made (25 & 26 Vict. c. 83, sect. 12). In such Co. COUNCIL.
a case, a subsequent occupier such as the plaintiff would under
this section have been liable for a proportionate part of the rate.
But the section was not availed of—presumably from ignorance
of the real facts. The rate was consequently bad. I think the
decision and judgments in the *Guardians of New Ross v. Byrne* (1)
leave no doubt on that point. In that case the rating was held
to be invalid as against the person named as an occupier, but who
in reality was not in occupation. The judgments go the length
of treating the rate as absolutely void as against all parties,—
Johnson, J., at the close of his judgment stating that "the entire
rate was void *ab initio*."

The defence of Drohan depends on the rate for which he
levied being duly and properly made; and, as it was not so,
his justification fails, and the verdict in the plaintiff's favour,
so far as he is concerned, must stand, and judgment as against
him for the amount found by the jury be entered.

Solicitor for the plaintiff: *Robert S. Baylor.*

Solicitor for the defendant Drohan: *Henry D. Keane.*

Solicitor for the defendants the Waterford County Council:

Dobbyn & McCoy.

A. E. C.

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Jan. 13.

THE KING (LAMBE) v. THE JUSTICES OF LOUTH (1).

Justices—Summons—Default of appearance—Reasonable time for service—Offence against Licensing Acts—Licensed person abroad—Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), s. 20, sub-s. 2.

The reasonable time for the service of a summons mentioned in sect. 20, sub-s. 2, of the Petty Sessions (Ireland) Act, 1851, means a reasonable time for enabling the defendant to present his defence, if any, and does not necessarily connote that the summons has been brought personally to the knowledge of the defendant.

Where a publican is abroad, he ought to have on the premises a person who for the purposes of his statutory obligations fully represents him, on whom, in proceedings for an offence under the Licensing Acts, service of a summons can be effected.

CERTIORARI.

Motion to make absolute a conditional order that a writ of certiorari should issue, directed to the justices of the peace for the county of Louth, to remove into the King's Bench, for the purpose of being quashed, the records of a conviction, upon a complaint made by the justices at the Dundalk Petty Sessions, on the 11th July, 1913, against the prosecutor for selling intoxicating liquors upon his licensed premises at prohibited hours.

On the 7th July, 1913, on the complaint of Michael Gilooly, a head constable of the Royal Irish Constabulary, a summons under the Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), and the Licensing Acts (Ireland), 1872 and 1874 (35 & 36 Vict. c. 94; 37 & 38 Vict. c. 69), was issued directed to the prosecutor, and charging him that he "being a person duly licensed to sell intoxicating liquors by retail at your licensed premises 92 Park Street, Dundalk, in the County of Louth, did, at a time prohibited by law, and at a period during which such licensed premises are by law required to be closed, to wit, at 7.15 a.m. on Sunday the 6th day of July, 1913, unlawfully sell intoxicating liquors on your

(1) Before PALLES, C.B., and GIBSON and DODD, JJ.

said licensed premises, against the form of the statute in such case made and provided." There was also a summons taken out for opening the licensed premises, but this was dismissed.

The prosecutor, besides carrying on a licensed business upon the premises mentioned in the summons, was captain of a sailing ship, the "Irish Girl," and in his capacity as captain of that vessel was frequently absent from Dundalk, and at sea. In an affidavit sworn by him in support of the motion, the prosecutor stated that, on the day upon which the offence was charged to have taken place, the 6th July, 1913, he left Glasgow on the "Irish Girl" for Briton Ferry in South Wales, and that he did not arrive there until the 16th July, 1913. It appeared that, during his absences at sea, his licensed premises were managed, with his knowledge and consent, by his wife, Mrs. Mary Lambe, and that on the 6th July, 1913, she was present upon the licensed premises. The summons of the 7th July, 1913, was served on that date by leaving a copy with the prosecutor's wife, Mrs. Mary Lambe, at the licensed premises. There was a conflict of evidence upon the affidavits before the Court as to whether the constables examined at the hearing of the complaint were aware at the time of the service of the summons that the prosecutor was away, and could not be communicated with. In fact, the prosecutor was then at sea, and in his affidavit, above referred to, he swore that he had written before the 6th July, 1913, to his wife stating he was about to leave Glasgow for Briton Ferry, and that, on the 16th July, 1913, on his arrival at the latter port, he had written to his wife, that being the first intimation which the latter had of his whereabouts between the 6th and the 16th July, 1913.

The complaint in the summons of 7th July, 1913, was heard by the justices sitting at petty sessions for the district of Dundalk, on the 11th July, 1913, when Mr. Dickie, solicitor, appeared for Mrs. Lambe, and objected that the service of the summons had not been properly effected, the prosecutor being at the time of the service absent from home and not in a position to be communicated with. It appeared from an affidavit made by Michael Gilooly, the complainant in the summons, and filed by way of showing cause against the conditional order, that at a previous prosecution under the Licensing Acts against the prosecutor, in June, 1913,

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PEACE.

K. B. Div. 1914. Mr. Dickie had appeared for the prosecutor, and had raised the same objection as to service which had been overruled by the justices then adjudicating. At the hearing on the 11th July, 1913, the service upon Mrs. Mary Lambe was proved, and evidence given that she conducted the licensed business during the prosecutor's absences, but no evidence was given as to the whereabouts of the prosecutor at the time of the summons, or at the time of the hearing; but Mr. Dickie stated to the justices that the prosecutor was at sea at the time when the summons was served upon his wife. The magistrates convicted the prosecutor upon the charge in the summons, and imposed a fine of £3, with 1s. 6d. costs, with the alternative of imprisonment for one month. The conviction was directed to be endorsed on the license. In his affidavit the prosecutor swore that he received no intimation of the summons and conviction until he received a letter from his wife on the 19th July, 1913, informing him of the conviction. On receipt of this letter the prosecutor wrote to Mr. Dickie to act for him. That letter did not reach Mr. Dickie until the 22nd July, 1913, when the time for taking an appeal from the conviction had expired.

The conditional order was obtained on the 28th July, 1913, upon the following grounds:—"That the said conviction was made without and in excess of jurisdiction; that the said decision was made *ex parte* in the absence of the defendant; that there was no proof that the summons had been served within a reasonable time before the hearing; and that there was evidence that the summons could not have reached the defendant."

The evidence before the Court consisted of the affidavit of Mr. Dickie, upon which the motion for the conditional order was grounded, the affidavit of the prosecutor in support of the motion, and affidavits of Constables M. J. O'Dwyer and O. Halton, and Head-Constable Gilooly, filed to show cause.

The case, when coming before the Court originally upon the motion to make absolute the conditional order, was adjourned for the purpose of having an affidavit filed relative to the prosecutor's whereabouts at the date of the service and hearing; and the prosecutor's affidavit, above referred to, which was filed for that purpose, was not sworn until the 3rd November, 1913.

Alfred Dickie, for the prosecutor.

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Where the defendant to the complaint does not appear, the justices must be satisfied that the summons was served within a reasonable time before the time appointed for appearing: Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), s. 12, s. 20, sub-s. 2. Here the justices knew that the prosecutor was away; they did not know where he was; there was no evidence that he could be communicated with. The prosecutor is, no doubt, liable for the acts of his manager, when those acts are done within the scope of the manager's authority; but this is a prosecution involving penalties and possible imprisonment, and the prosecutor, as defendant, was entitled to be heard in his defence; he was entitled to present, if he could, the defence that the acts done by his manager in his absence were not within the scope of the manager's authority. A reasonable time means a time reasonable to allow the defendant to prepare his defence; it cannot be contended that such a time has elapsed where the defendant cannot know the offence with which he is charged. It is clearly law that the service would be bad if this was an ordinary case, such as that of the assault in *R. v. Smith* (1), or the case of *R. (Dickie) v. Donegal Justices* (2). There is no special provision in the licensing code to show a different legal principle applies; the absent publican under circumstances such as these could not be reached; but there is a remedy. The licensing authority should not grant licences to persons habitually absent from the licensed premises.

The Solicitor-General (Jonathan Pim, K.C.) and James Rearden, for the justices.

The justices are the judges of whether the summons was served in a reasonable time: *In re Williams* (3); *R. v. Cambridge-shire Justices* (4). If this was an ordinary case of assault, as in *R. v. Smith* (1), Mr. Dickie would be right; but the general scope of the Licensing Acts shows that here a different principle applies. The licensee must occupy the premises for the purposes of his

(1) L. R. 10 Q. B. 604.

(2) 44 I. L. T. R. 222.

(3) 21 L. J. (N. S.) M. C. 46.

(4) 44 J. P. 168.

K. B. Div. 1914. trade. Here the prosecutor continuously occupied the premises as a licensed publican, although he did not continuously reside; he knew, when he took his licence, that it carried with it the statutory obligations, the failure to fulfil which would result in prosecution and liability to a summons. The control of a licensed business is intended by the statutes to be a personal control of the licensee; the proper conduct, subject to the statutory obligations, is controlled by the police, who can summon the licensee and make him amenable for his violation of his duties and obligations as a licensed trader, and, although there is no specific enactment that prosecutions under the licensing code are to differ from ordinary cases in respect of the service of the summons, the intention of that code can be gathered from the statutes as a whole, and that intention cannot be construed to defeat the personal control of licensed business by permitting the publican, in such a case as the present, to escape liability by absence from the licensed premises.

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Alfred Dickie, in reply :—

PALLES, C.B. :—

We have considered this case, which seems to involve a point of first impression. We are of opinion that the reasonable time mentioned in sect. 20, sub-sect. 2—a sub-section which deals alike with summonses in respect as well of civil as of criminal complaints—means a reasonable time for enabling the defendant to present his defence, and does not *necessarily* connote that the summons has been brought personally to the knowledge of the defendant. As, for instance, if the defendant went away to avoid service, or if his manager negligently omitted to forward the summons to him, or if the defendant beforehand instructed his manager, in expectation of a summons, to act for him in relation to it, if he was away, the defendant might not know of the issue of the summons, and still a reasonable time might have been deemed to have elapsed.

We are also of opinion that, in considering the reasonableness of the time in a case in which the business is carried on during the publican's absence abroad, he is bound to have on the premises a person who for the purposes of his statutory obligations fully represents him.

None of the cases cited have any application to the present. K. B. Div.
1914.

In result then it is not shown that the justices had not jurisdiction. The conviction must consequently stand. As the question was a new one, we do not give costs. THE KING
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GIBSON and DODD, JJ., concurred.

Solicitor for the prosecutor: *Robert Dickie*.

Solicitor for the justices: *Sir Malachy Kelly, Chief Crown Solicitor.*

C. N. K.

GREENAWAY, APPELLANT; MURPHY, RESPONDENT (1). K. B. Div.
1914.

Justices—Irish Education Act, 1892 (55 & 56 Vict. c. 42)—Attendance order
—Form of order—Necessity to specify in order the “regular manner” of Jan. 14.
attendance.

Justices in making an attendance order under s. 4, sub-s. 1, of the Irish Education Act, 1892, must specify therein the “regular manner” in which the child is to attend the school. An attendance order which merely directs attendance to be made “in accordance with the requirements” of the Act is not a good order under the statute.

CASE STATED upon the application of the appellant, the school attendance officer of the Armagh Rural District School Attendance Committee, under 20 & 21 Vict. c. 43, by the justices of the peace for the county of Armagh sitting at petty sessions for the district of Keady in that county, on the 17th November, 1913. The material facts as set out in the case were as follows:—

On the 22nd October, 1913, the appellant, in his official capacity as attendance officer, took out a summons under the Petty Sessions (Ireland) Act, 1851, and the Irish Education Act, 1892 (55 & 56 Vict. c. 42), against the respondent, charging the respondent as parent or guardian of two children between the ages of six and fourteen years, namely, Mary C. Hughes and John F. Hughes, with failing to cause the two children to attend school as required by the Irish Education Act, 1892. The summons was heard by the justices who stated the case, at Keady Petty Sessions, on the 17th November, 1913, when the

(1) Before PALLES, C.B., and GIBSON and DODD, JJ.

K. B. Div. justices found the following facts proved :—(a) The children
 1914. named in the summons had attended school three days and no
 GREENAWAY, days respectively, in the period from 1st July, 1913, to 6th
Appellant; October, 1913; and, consequently, neither of them could attend
 MURPHY the seventy-five days in the half-year, as required by the Irish
Responden, Education Act, 1892; (b) there was no reasonable excuse for
 their non-attendance; (c) both children were between the ages
 of six and fourteen years; (d) the respondent was the “parent”
 and had custody of the children within the meaning of sect. 13
 of the Irish Education Act, 1892, being their step-father. Upon
 those findings the justices adjudged that an attendance order
 should be made, and accordingly an attendance order in the case
 was drawn up upon a printed form, and signed by the four justices
 who adjudicated. The curial portion of that order was as
 follows :—“It is hereby, on this 17th day of November, 1913,
 at said Court ordered by us that the said children, John and
 Mary C. Hughes, do from this date attend, in accordance with
 the requirements of the Irish Education Act, 1892, the
 Aughnagurgan National School or other efficient school.” Upon
 the printed form used for the order there were, after the
 words, “or other efficient school,” the following words :—“on each
 day during the whole time that such school shall be open for the
 instruction of children until such child shall have attended the
 full number of days in each half-year required by said Act.”
 These latter words were struck out of the order made and signed by
 the justices, and Mr. Maxwell, solicitor for the appellant, objected
 to the form of the order on account of the deletion of these words.
 When the objection was made, the members of the Court, with
 the exception of the resident magistrate, Mr. Dunsterville, had
 left the Court, and Mr. Dunsterville refused to alter the form
 of the order which had been signed, the Court having dispersed;
 and also because, as stated in the case, he was of opinion that the
 attendance order in that form was legally valid and good, pursuant
 to the provisions of sect. 4 of the Irish Education Act, 1892.

The following are the material sections or portions of sections
 of the Irish Education Act, 1892. Sect. 1, sub-sect. 1: “In every
 place to which this section applies, the parent of every child not
 less than six nor more than fourteen years of age shall cause the
 child to attend school during such number of days in the year

and for such time on each day of attendance as are prescribed in the first schedule to this Act, unless there is a reasonable excuse for non-attendance.”

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GREENAWAY,
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First schedule : “ The number of attendances for the purposes of the first section of this Act shall be seventy-five complete attendances in each half-year ending respectively the 30th day of June and the 31st day of December, at any national or other efficient school.”

Section 13 : “ For the purposes of this Act the expression ‘ parent ’ shall include the guardian of a child, and every person who is liable to maintain, or has the actual custody of, the child.”

Section 4 (sub-sect. 1) : “ If any parent who is required by this Act to cause his child to attend school makes default without reasonable excuse in so doing, the school attendance committee shall, after due warning to the parent, make a complaint to a Court of summary jurisdiction, unless they think it is inexpedient to take such proceedings, and the Court, if satisfied of the truth of the complaint, may make an order (in this Act called an attendance order) that the child do attend, in accordance with the requirements of this Act, some national or other efficient school, and, subject to the provisions of sect. 1, of this Act, the child shall attend some such school in such regular manner as is specified in the order.” Sub-sect. 2 : “ If the school attendance committee have reason to believe that an attendance order has not been complied with, and that there is not any reasonable excuse within the meaning of this Act for non-compliance therewith, they may make a further complaint to a Court of summary jurisdiction, and thereupon, if the parent does not satisfy that Court that the order has been complied with, or that he has used all reasonable efforts to comply therewith, the Court may impose on him a fine not exceeding, including costs, five shillings.” Sub-sect. 3 : “ A complaint under this section, with respect to a continuing non-compliance with an attendance order, shall not be repeated by the school attendance committee at any less interval than two months.”

Section 8 : “ No legal proceedings for non-attendance or irregular attendance at school shall be commenced in a Court of summary jurisdiction by any person on behalf of a school attendance committee, except by direction of not less than three members of the said committee.”

K. B. Div. *Robert Calvert, and Best, K.C., for the appellant:—*
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GREENAWAY,
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Respondent.

The justices must state in their order the regular manner in which the attendance is to be made. Under sect. 1 of the Irish Education Act, 1892, there is no regular manner prescribed. The parent has a discretion so long as the seventy-five complete attendances required are made in each half-year; he is under no obligation to make those regular so long as the number is completed. The parent's discretion is removed once an attendance order is made; penalties can be imposed for non-compliance with the order (sect. 4, sub-sect. 2). The proceeding for non-attendance in the first instance is not for penalties but for an attendance order, and if that order simply directs attendance in accordance with the requirements of the Act, it does nothing more than leave the matter where it stood. Further, sect. 8 provides for proceedings for irregular attendance which cannot be under sect. 1, for under that no regularity is required. Such proceedings must arise by reason of an order for regular attendance, and the words, "in such regular manner as is specified in the order," in sub-sect. 1 of sect. 4, show that it is intended that the justices should not only order attendance as required by the Act, but specify the regular manner in which the attendance is to be effected, that is the number of days in the week. The English Education Act of 1876 shows that that is the intention of such a provision.

There was no appearance for the respondent.

The Court made the following order:—

"It is considered and adjudged by the King's Bench Division that the said justices were not correct in point of law in not specifying in the said attendance order the regular manner in which the children were to attend the school. And it is hereby ordered that the matter of the said complaint be remitted to the said justices to enter continuances with a direction from the Court here that they are to make an attendance order and to specify therein the regular manner in which the respective children are to attend the school. No costs."

Solicitor for the appellant: *Frederick Maxwell.*

C. N. K.

O'BRIEN v. KILLEEN (1).

K. B. Div.
1913.

*Practice—Garnishee Order—No cause shown by garnishee owing to mistake—
Order made absolute—Jurisdiction of Court to set aside absolute order.*

Nov. 4, 6.

The plaintiff had obtained a garnishee order attaching a debt alleged to be due to the defendant by a county council, and calling on the county council to show cause why it should not be paid to the plaintiff. This order was served on the county council. Prior to the date of the order the debt had been assigned for value by the defendant to third parties, and notice of the assignment given to the county council. Owing to a mistake on the part of the secretary of the county council, no cause was shown against the conditional order, and it was made absolute.

Held, that the Court had jurisdiction to set aside the absolute order, and that, in the special circumstances, it should be set aside.

MOTION to set aside a garnishee order which had been made absolute.

The defendant, Killeen, who was a collector of rates under the Clare County Council, had made a promissory note for £26, payable to the Provincial Bank, Ennis, in which note James W. Scott, John Lynch, and Augustine Quinlivan had joined as sureties. This note became due on the 16th August, 1913, and Killeen failing to meet it, the bank served a notice on Scott, Lynch, and Quinlivan, demanding payment of the amount, and these three gentlemen discharged the note by signing a new joint and several promissory note for £26 payable to the bank. Killeen having been dismissed from his office of rate collector, the three gentlemen above named applied to him for security for the debt they had incurred on his behalf by executing the new bill, and on the 18th September, 1913, he assigned to them, in consideration of their indebtedness as aforesaid, all moneys then due to him by the said county council, upon trust to pay to themselves the said sum of £26, with interest thereon due

K. B. Div. to the bank, and to hold the balance, if any, in trust for him.
1913. There was at this time a sum of £31 18s. 2d. due by the
O'BRIEN county council to Killeen as rate collector, in respect of the
v. half-year ended March 31st, 1913. Notice of this assignment was
KILLEEN. duly served on the county council upon the 18th of September.

O'Brien, the plaintiff in the present action, had obtained judgment for a sum of £31 11s., including costs, against Killeen; and, the sheriff having made a return of "no goods," he on the 23rd September obtained on an *ex parte* application a garnishee order attaching the said sum of £31 18s. 2d., and calling on the Clare County Council to show cause why it should not be paid to the plaintiff. This order was duly served on the assistant secretary to the county council on the 30th September, and no cause being shown, it was made absolute by the Court on the 7th October; such absolute order being served on the secretary of the county council on the 16th October. It appeared from the affidavits that the secretary of the county council went on holidays on the 3rd September, and that the order of the 23rd September was not brought to his notice until his return on the 3rd October, and he did not then observe that the order directed cause to be shown against the same. On the 3rd October he had a draft for £31 11s. made out in the name of O'Brien, the plaintiff, and handed the same to Mr. Francis F. Cullinan, plaintiff's solicitor. Subsequently, however, when the absolute order was served on the secretary on the 16th October, he had his attention directed to the fact that notice of Killeen's assignment to Scott, Lynch, and Quinlivan had been served on the 18th September, and that this constituted good ground for showing cause against the conditional order being made absolute. Payment of the draft in favour of the plaintiff had been stopped on the 4th October.

The Clare County Council now applied to have the absolute order of the 7th October set aside, and asked for liberty to bring the said sum of £31 18s. 2d. into Court, setting forth the facts as above, and basing their application on the grounds of mistake, misadventure, and injustice to the assignees under the assignment of the 18th September.

M. Comyn, for the Clare County Council :—

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This Court has power to set aside its own absolute order where mistake has occurred: *Moore v. Peachey* (1); *Marshall v. Jones* (2); or where the order would work an injustice: *Burrell & Sons v. Read* (3). The circumstances show that a *bona fide* mistake was made by the secretary of the council; the sum in question was the property of the three assignees, and an injustice would be done if the absolute order is not discharged.

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Phelps, for the assignees, Scott, Lynch, and Quinlivan, referred to *Hirsch v. Coates* (4) and Order XLV, Rule 5.

Horan, for plaintiff :—

The only jurisdiction in this Court to set aside this absolute order is a jurisdiction arising when there is fraud, or suppression of fact, or an irregularity in obtaining the order; there is none of these circumstances in the present case.

M. Comyn, in reply.

KENNY, J. :—

This is an application by the County of Clare County Council to set aside an order dated the 7th October, 1913, by which, under the garnishee procedure, a conditional order dated the 23rd September, 1913, attaching on behalf of the plaintiff a sum of £31 18s. 2d. due to the defendant by the county council, was made absolute. The plaintiff's judgment was for £31 11s., and the order sought to be set aside is in the customary form directing the payment by the county council to the plaintiff of the sum so due by the council to the defendant, to satisfy the plaintiff's judgment debt and costs.

The circumstances under which the county council move to set aside the order, against the making of which they should have shown cause if they had a case for doing so, are these :—The secretary of the county council went on his holidays on the 3rd September, 1913, and did not return until the 3rd October. In the meantime, on the 30th September, the conditional order of the 23rd September was served. There is

(1) 66 L. T. R. 198.

(2) [1905] 1 Ch. 432.

(3) 11 T. L. R. 36.

(4) 18 C. B. 757.

K. B. Div. no question as to the validity of the service, which was effected
1913. by serving a clerk in the secretary's office. It is alleged that the
O'BRIEN fact of the order of the 23rd September having been made was
v. not brought to the notice of the secretary until after his return
KILLKEN. on the 3rd October, 1913, when the time for showing cause against
Kenny, J. it had expired. The order of the 7th October having been
obtained, was served on the Secretary on the 16th October,
when, it is alleged, he became aware for the first time that
the former order gave liberty to show cause. He then
realized that he had good grounds for showing cause against
the conditional order, which would have effectually prevented
its being made absolute; and his contention now is that he
should be allowed to put forward these grounds on a motion to
set aside the order of the 7th October.

The council's case discloses the fact that, by an assignment in writing of the 18th September, the defendant transferred the debt of £31 18s. 2d. to a Mr. Scott and two other gentlemen by way of indemnity against their liability on a joint and several promissory note, given by them to the Bank in discharge of a previous promissory note which the defendant had entered into with the three transferees, and on foot of which he was primarily liable. By the terms of the assignment the three assignees were to hold the debt upon trust in the first instance to indemnify themselves, and, subject thereto, on trust for the defendant. The promissory note is still running. Notice in writing of the assignment was served on the county council on the 18th September, 1913.

A warrant for £31 11s., portion of the debt of £31 18s. 2d., had been made out in favour of the plaintiff, and was handed over to Mr. Francis F. Cullinan, his solicitor, on the 3rd October, 1913.

If the foregoing facts had been properly put forward on the 7th October, as cause against making absolute the conditional order of the 23rd September, the Court, following the practice as laid down in Order XLV, Rule 5, would have either decided the question of ownership of the debt due by the county council, or would have directed notice to be served on the assignees under the deed of the 18th September, with a view to ascertaining if the trial of an issue should be directed. The assignees have

been served with the present notice of motion, and have appeared before us by counsel and claimed to be owners of the debt.

When this motion was opened, I thought that the order of the 7th October could be varied or reversed only by the Court of Appeal, but authorities have been cited to us showing that this Court, in special circumstances, retains control of its own order, and can discharge or vary it. The grounds have, in some cases, been that of mutual mistake, as in *Moore v. Peachey* (1) and in *Marshall v. James* (2); and in others, the fact that an injustice would be worked if the order stood. In *Wood v. Dunn* (3), Channell, B., in special circumstances no doubt, points out that an application to set aside the absolute order might be made. I am of opinion that there are special circumstances in the present case, and that we ought to make the order.

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Kenny, J.

MOLONY, J., concurred.

The Court made the following order :—

Mr. Horan, plaintiff's counsel, declining to take an issue as to the validity of the assignment of the sum of £26 to the said assignees, and it appearing that the bill to the Provincial Bank, Ennis, referred to in the affidavit of the said James W. Scott, was one signed by the said James W. Scott, John Lynch, and Augustine Quinlivan, and not by the said defendant, and that the defendant is not under any liability to the bank on foot of the said bill: It is ordered that the said orders of the 23rd September and 7th October, 1913, be set aside, and that the said county council of the County of Clare do pay to the plaintiff his costs of this motion when taxed by the proper officer, and to the said assignees the sum of £4 4s. for their costs of appearing on this motion. And it is further ordered that the said county council of Clare do, out of the sum of £31 18s. 2d. in their hands, pay to the said assignees the sum of £26, and the balance thereof, viz. £5 18s. 2d., to the said plaintiff in part satisfaction of the amount due to him on foot of his judgment in this action.

Solicitor for the plaintiff: *Francis F. Cullinan*.

Solicitor for Clare Co. Council: *John F. Cullinan*.

Solicitors for Scott, Lynch, and Quinlivan: *Molony & Pilkington*. J. M.

(1) 66 L. T. 198.

(2) [1905] 1 Ch. 432.

(3) L. R. 2 Q. B. 73.

K. B. Div.
1914.

BEIRNE, APPELLANT; DUFFY, RESPONDENT (1).

Jan. 14.

Licensing Acts—Licensed premises—Business other than sale of intoxicating liquors carried on—Structural separation—Intoxicating Liquors (Ireland) Act, 1906 (6 Edw. 7, c. 39), s. 2.

A sale of drink consists in the order for the drink and the delivery of the drink in pursuance of the order. Where a publican carries on upon the licensed premises a business other than that of the sale of intoxicating liquors, and that portion of the premises used for the sale of such liquors is divided from the portion used for the purposes of such other business by a separation of such a character that, notwithstanding its existence, an effective order for drink can be given by a person in the latter portion to, and be received by, a person in the former portion of the premises, and drink can be supplied in pursuance of that order, such separation is not a "structural" separation within the meaning of sect. 2 of the Intoxicating Liquors (Ireland) Act, 1906 (2).

(1) Before PALLES, C.B., and GIBSON and DODD, JJ.

(2) Intoxicating Liquors (Ireland) Act, 1906 (6 Edw. 7, c. 39), s. 2: "It shall not be lawful for any person to sell or expose for sale intoxicating liquor, or to open or keep open any premises for the sale of the same, on Saturdays after 10 o'clock at night, in the case of cities or towns, the population of which, according to the last parliamentary census, exceeds 5000, and after 9 o'clock at night, in all other towns and places in Ireland; and the provisions of every Act (in regard to penalties and otherwise) relating to selling or exposing for sale, or purchasing, intoxicating liquor, or opening or keeping open any premises for the sale of intoxicating liquor, or being present in or upon any such premises at any hour, shall be amended in this particular, and shall apply as if the said hours respectively were specified therein as the hours at which licensed premises are required to be closed on Saturdays. Where any business, other than the sale of intoxicating liquors, is carried on in the licensed premises the whole of such premises shall be closed at the hours aforesaid, unless the portion of the same in which such sale of intoxicating liquors is carried on is structurally separated from the remainder of the building. Nothing in this Act shall in any way interfere with the rights of any licensed person who is the owner or lessee of a theatre, music hall, or other place of public amusement, but all such persons shall have the same rights and privileges as they have now under the existing licensing law as if this Act had not been passed."

A separation between the bar of a hotel and a billiard-room (which is not licensed, but which is owned by the hotel proprietor and used for the purposes of profit), if it contain a glass portion through which a signal for drink can be given and received, resulting in the delivery of the drink ordered by taking out the drink from the bar to the billiard-room through a yard, is not a "structural separation" within the above Act and section.

K. B. Div.
1914.
BEIRNE,
Appellant;
DUFFY,
Respondent.

CASE STATED under 20 & 21 Vict. c. 43, on the requisition of the appellant, by the justices of the peace for the county of Roscommon, sitting on the 6th November, 1913, at petty sessions at Strokestown.

On the 29th October, 1913, the appellant, a district inspector of the Royal Irish Constabulary, took out a summons against the respondent, a hotel proprietress and publican in Strokestown, charging her with three separate offences under the Licensing Acts, namely, that of keeping open her licensed premises at a time and at hours prohibited by law, that of opening her licensed premises for the sale of intoxicating liquors at a time and at hours prohibited by law, and that of failing to close her licensed premises from 9 p.m., as required by sect. 2 of the Intoxicating Liquors (Ireland) Act, 1906, 6 Edw. 7, c. 39, the licensed premises being used for the carrying on of a business other than the sale of intoxicating liquors, namely, billiard-playing (1), and the portion of the premises used for the sale of intoxicating liquors not being structurally separated from the remainder of the building. All the offences were charged as having occurred at 10.5 p.m. on Saturday, the 18th October, 1913.

The summons having been adjourned from the Strokestown petty sessions held on the 23rd October, 1913, came on for hearing on the 6th November, 1913, at Strokestown petty sessions before a bench of magistrates composed of the resident magistrate, Mr. Rice, and six justices, namely, Messrs. Mitchell, Walpole, O'Beirne, Murray, Kerr, and Maguire, when the appellant appeared and prosecuted, and the respondent was

(1) That keeping a billiard-room for the purposes of profit is carrying on a business within the meaning of s. 2 of the Act, and that such billiard-

room does not come within the exception as being a "place of public amusement": see *Mercer v. O'Shaughnessy*, *post*, pp. 74, *et seq.*

K. B. Div. 1914. defended by her solicitor, Mr. Gaynor. Upon hearing the evidence, all the magistrates were agreed in finding that there were no offences under the first two counts in the summons, namely, those of keeping open and opening for sale at a time and at hours prohibited at law. Upon the third count—that under the Intoxicating Liquors (Ireland) Act, 1906—the Bench was divided. The majority of the magistrates, namely, Messrs. Mitchell, Walpole, O’Beirne, Murray, and Kerr, found that there was a permanent and sufficient structural separation between the portion of the premises used for the billiard-playing and the remainder of the premises—a finding from which the resident magistrate dissented; and Mr. Maguire refused to take part in any decision, on the ground that he was not satisfied on the evidence that the portion of the premises used for the billiard-playing was part of the licensed premises. As a result all the charges against the respondent were dismissed by the order made in the case. The evidence upon which the magistrates made their findings, upon the appellant’s application, was taken down and recorded in the evidence-book, and was incorporated in the case. The portions of that evidence material to this report are as follows:—

Head-Constable John Russell—“ I remember the 18th October. I entered the licensed premises of the defendant at about 10.5 p.m. by the yard gate, which was open. From the yard I went into the billiard-room, which is built from the rear of the hotel proper into the yard, off the bar. There was light in the billiard-room, and men were playing billiards or looking on at the game. The billiard-room is separated from the bar by a door, the lower portion composed of timber and the upper of glass. It is held in position by an iron bar on each side, bolted and screwed. There is a full view from the bar into the billiard-room. There is a door from the billiard-room into the hall of the licensed house. This door is closed exactly in the same manner as the door from the bar into the billiard-room. I entered the hotel through the back door. This door was closed when I demanded admission. It was opened by a servant of the hotel. From the back door of the hotel to the door of the billiard-room opening into the yard is about 18 feet, and it is about 6 feet from the nearest window in

the billiard-room to the back door of the hotel." Cross-examined—"The lower portion of the door from billiard-room to bar was boarded across from jamb to jamb, and, on the bar side there were boxes stored up against it. There is an iron bar both on the billiard-room side and the bar side of this door. Both are bolted to the jambs. The door is permanently closed. The glass in the door would be useful in letting light into the bar. In the door leading from the bar to the hall there are also two iron bars bolted across. This door is also permanently closed. There is a window leading from the billiard-room into the bar. This window is fastened by the same means as the two doors I have described."

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The appellant—"I entered Miss Duffy's hotel with Head-Constable Russell at 10.5 p.m. by the yard gate, which was open. I saw the billiard-room open, and four boys in it. I passed on into the hotel by the back door, which was latched. I opened it, and asked one of the servants for Miss Duffy. She came to me, and I told her about the yard gate being open, and boys playing billiards in the billiard-room, and I pointed out to her that there was nothing to prevent drink being supplied to them if she was so inclined."

The respondent—"The billiard-room is not licensed. The billiard-room was not built when the hotel was originally licensed, a good many years ago. I have kept the billiard-room open . . . and I am aware that it has been kept open since 1902. I agree with the description given by Head Constable Russell as to the way the door leading from the billiard-room to the bar is fastened. It has never been opened since I became licensed. The door leading from the billiard-room into the hall is permanently closed; and it has not been used since I got the licence. On the 18th October no drink was supplied to any person after 9 o'clock, except guests in the hotel. I do not supply drink to the billiard-room now. The arrangements regarding the closing of the doors were made to satisfy a former district inspector of the Royal Irish Constabulary. The door from the yard into the hall is fastened by a latch-lock which cannot be opened from the outside, and that back door is closed at 9 o'clock, except when servants are passing in and out. It was closed on the evening in question at

K. B. Div. 9 o'clock. The police have found this door closed on other
 1914. occasions after 9 p.m. On the night in question one of my
BEIRNE, servants came in by this door for hot water; he told me so. I
Appellant; am aware this door was closed up to a short time before the
DUFFY, entrance of the district inspector. The bar door was locked on
Respondent. this night."

Cross-examined—"The structural separation between the billiard-room and the bar and hall was made before I became licensed. Billiard-playing is carried on in the billiard-room after closing hours, and I receive payments from persons using the table. I wish to say that one of the doors leading from the billiard-room was closed up since a conviction against my mother."

The case was signed by all the justices present at the hearing, and sought the opinion of the Court as to whether the justices were right in dismissing the complaint against the respondent on the merits.

James Rearden (with him *the Solicitor-General, Jonathan Pim, K.C.*), for the appellant.

Section 2 of the Intoxicating Liquors (Ireland) Act, 1906 (6 Ed. 7, c. 39), contemplates a permanent structure which cannot be used for the sale of drink: *Toppin v. Coleman* (1). This structure is not of that character, for the bars securing the door could be unscrewed by the publican at any time, and the door opened; it is in effect not more permanent than a locked door.

Leonard and Godfrey Fetherstonhaugh, K.C., for the respondent.

Every case under this section depends upon its facts. Here there was boarding across the door in addition to the bars. To open the door it would be necessary to do a destructive act; that, it is submitted, is the real test of what is a structural separation. Anything which is required to be destroyed, in part or in the whole, to remove the bar of separation must be a "structural

separation" as contemplated by the section. [Dodd, J.—What is there to prevent a person in the billiard-room signalling for a drink to a person in the bar? Could he not signal with his fingers through the glass portion of this door?] He might of course do that, but even if the separation was a permanent brick wall with no glass, if there was a bell in the billiard-room which communicated with the bar he could ring for a drink, or he could signal for a drink by rapping on the wall. If there was a brick wall, it would be as reasonable to argue that a brick could be removed for the purposes of a sale, as to argue, as is done in this case, that the screws securing the bars across the doors could be unfastened.

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James Rearden, in reply :—

I accept the test, suggested by respondent's counsel, that a destructive act is necessary to remove such a permanent separation as the section contemplates; but when that test is applied here, it is fatal to the respondent's case. A simple operation such as the unscrewing of the screws securing the bars across the door, and the unlocking of that door, cannot be classed as a destructive act, and, judged by that test, which I adopt, the separation is not permanent or sufficient.

The judgment of the Court was delivered by

PALLES, C.B. :—

We have considered this case, and we do not think that there would be any advantage in allowing it to stand for judgment. The question is, whether there is a "structural separation" within the meaning of the Intoxicating Liquors (Ireland) Act, 1896 (6 Edw. 7, c. 39, s. 2), between this billiard-room and the bar. Between these two apartments there are a door and a window. The door consists partly of glass; and it is admitted that, either through the window or the glass portion of the door, an order for drink could be given by a person in the billiard-room to a person in the bar, who could, at a distance of 18 feet from the bar, enter the billiard-room and fulfil the order. The question which

K. B. Div. 1914. we have to determine is, whether this separation—call it structural separation, if you will—through which an order for drink could be given to, and received in, the bar, is a “structural separation” from the bar within the meaning of the Act. In our opinion it is not.

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Respondent.
Palles, C.B.

This is an Act which deals with the sale of drink, and the object of this section (s. 2) of the statute was to prevent the sale of drink in a place corresponding to this billiard-room. A sale of drink consists in the order for the drink, and the delivery of the drink in pursuance of the order; and where the separation is of such a character that an effective order for drink can be given, from the place alleged to be separated, to, and received at, the bar, and where drink so ordered can be delivered in pursuance of the order, we do not think it is a separation within the meaning of the statute.

We must, accordingly, send back the case to the magistrates. They were right in dismissing upon the first two counts in the summons, but were wrong in dismissing upon the third count.

As this establishment is admittedly carried on honestly, and as there was no intention of violating the Licensing Acts, although we decide against the publican, we do so without costs.

Solicitor for the appellant: *Sir Malachy Kelly, Chief Crown Solicitor.*

Solicitor for the respondent: *T. J. Gaynor.*

C. N. K.

NOTE.

KING'S BENCH DIVISION, 8th December, 1910.

Before PALLES, C.B., and GIBSON and BOYD, JJ.

MERCER, APPELLANT; O'SHAUGHNESSY, RESPONDENT.

Keeping a billiard-room for the purposes of profit is carrying on a business within the meaning of sect. 2 of the Intoxicating Liquors (Ireland) Act, 1906. Such billiard-room is not a “place of public amusement” within the exception in the section.

CASE STATED under 20 & 21 Vict. c. 45, on the requisition of the appellant, by the justices for the county of Galway, sitting on the 28th November, 1910, at petty sessions for the district of Galway.

The appellant, a district inspector of the Royal Irish Constabulary, was the complainant in a summons which charged the respondent Emily O'Shaughnessy, a publican in the town of Galway, with unlawfully opening her licensed premises for the sale of intoxicating liquors at a time prohibited by law, and at a period when the premises were required to be closed by law. The complaint was heard by the justices who stated the case, at Galway petty sessions, on the 28th November, 1910, when the following facts were proved. The appellant was proprietress, as a licensed victualler, of premises known as "The Racquet Court," in the town of Galway, upon which there was a billiard-room, for the use of the table in which the respondent charged at the rate of 6*d.* for a game of 100 points. The billiard-room was situate at the rear of the premises, at the top of a flight of stairs, and was approached by a passage which led from the street to the stairs. On the left side, from front to rear of this passage, there were three doors which communicated with the portion of the premises where the intoxicating liquors were kept. On the occasion when the offence charged was alleged to have occurred, Sunday, the 18th October, 1910, at 10 p.m., these three doors were locked, and although there were men in the billiard-room playing at billiards, or looking on at the game, there was no evidence of any actual sale or supply of drink. The appellant contended that upon the evidence there was an offence under sect. 2 of the Intoxicating Liquors (Ireland) Act, 1906, there being no "structural separation" within the meaning of that section between the billiard-room and the other portion of the premises; and, although there was no proof of actual supply of drink, there was every facility for a breach of the Sunday Closing Act; and, in support of his contention, the appellant referred to the following authorities, viz.: *R. (Richardson) v. Sweeney* (1); *Rowan v. Downing* (2); *Topping v. Coleman* (3); *R. (Turnbull) v. Glynn* (4). It was also proved that upon a similar charge, heard by the justices at Galway petty sessions on the 23rd August, 1909, upon facts in all material respects identical with those in the prosecution upon which the case was stated, the respondent had been convicted, and had been fined 20*s.* and 1*s.* 6*d.* costs, with the alternative of fourteen days' imprisonment. That conviction was reversed by the Recorder of Galway on appeal at quarter sessions, on the 5th November, 1909. There was no report of the learned Recorder's judgment, and the evidence as to the grounds of his decision was conflicting. The justices who adjudicated on the 28th November, 1910, being of opinion that they were bound by the decision of the learned Recorder, dismissed the charge against the respondent, and, at the request of the appellant, stated this case on the 28th November, 1910, requiring the judgment of the Court as to whether they were right in law in so dismissing the complaint.

K. B. Div.
1910.

MERCER,
Appellant:
O'SHAUGH-
NESSY,
Respondent.

(1) 42 I. L. T. R. 174.

(2) 43 I. L. T. R. 201.

(3) [1910] 2 I. R. 200.

(4) 44 I. L. T. R. 233.

K. B. Div. *John Linehan* (with him, the *Solicitor-General* (*Charles A. O'Connor, K.C.*),
1910. for the appellant:—

MERCER,
Appellant;
O'SHAUGH-
NESSY,
Respondent.

The case is practically the same on the facts as that of *R. (Richardson) v. Sweeny* (1), except that here there are three doors, and not one only. The billiard-room is not within the exception contained in sect. 2 of the Intoxicating Liquors (Ireland) Act, 1906; it is not a "place of amusement." That definition connotes a place *ejusdem generis* with the places enumerated in that section, i.e. theatres and music-halls. In *Toppin v. Coleman* (2), part of the premises was used for billiards.

There was no appearance for the respondent.

The Court, being of opinion that the justices were wrong in law, remitted the case to the justices to enter continuances and convict the defendant.

Solicitor for the appellant: *The Chief Crown Solicitor.*

C. N. K.

Appeal.
1913.

MURPHY AND SANDWITH v. COONEY (3).

Nov. 6.

Employer and workman—Compensation—Action arising out of and in the course of employment—Death resulting from accident when under the influence of drink—Mate of vessel—Fall from bridge of vessel after having been ordered below as being unfit for duty—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1, sub-s. 1.

C. was mate of a steamship. He came on board at night heavily under the influence of drink, and went on the bridge, where, as was his duty, he took the wheel. Owing to his dangerous steering, the master ordered him below as not being fit for duty. C. remained for eight or ten minutes at the head of the ladder leading to the deck. A thud was shortly afterwards heard, and C. was found at the foot of the ladder with a wound on his head, from which death subsequently resulted. No one saw him fall.

Upon an application for compensation under the Workmen's Compensation Act, 1906, the county court Judge held that the accident arose out of and in the course of the employment. He also found that it was attributable to C. being heavily under the influence of drink, but that as death had resulted this did not bar the right to compensation, which he accordingly awarded.

Held, on appeal, that there was no evidence that the accident arose out of the employment, and that the decision of the county court Judge should be reversed.

(1) 42 I. L. T. R. 174.

(2) [1910] 2 I. R. 200.

(3) Before OBRIEN, L.C., and HOLMES, and CHERRY, L.JJ.

APPEAL from the decision of the Recorder of Cork, sitting as arbitrator under the Workmen's Compensation Act, 1906, awarding compensation on the application of Catherine Cooney on behalf of the dependents of James Cooney, deceased.

Appeal.
1913.
MURPHY
v.
COONEY.

The deceased was employed by the appellants as first mate on board their S.S. "Wythburn," and had been in that situation for three or four weeks, having previously been employed for upwards of a year in a like position on a sister ship belonging to the appellants. His average earnings were from 35s. to 38s. a week.

On the evening of the accident the deceased, heavily under the influence of drink, reached his vessel at Cork, at a time when the ladder and gangway had been pulled on board. The vessel was about to sail for Whitehaven, and had to delay her departure owing to his late arrival. He was helped on board, and immediately the vessel sailed. It was the duty of the deceased to come on the bridge and take the wheel when the vessel left port. After taking the wheel the deceased was navigating the vessel so dangerously that the captain took the wheel from him, and ordered him to go below as he was "not fit to be about the decks." Deceased then staggered across to the entrance to the bridge. The descent to the deck from this entrance was by means of a narrow, almost upright, ladder, some six feet in height. Cooney, instead of immediately going below, as ordered by the captain, remained standing at the head of the ladder for about eight or ten minutes. Shortly afterwards a thud was heard, and the deceased was found at the bottom of the ladder, with a wound on his head; no one, however, actually saw him fall. The wound was not considered serious at the time, but shortly afterwards he became unconscious, and was taken to hospital upon arrival of the vessel at Whitehaven. He was, however, subsequently brought back to Cork and placed in the infirmary there, where he died on the 27th March. The opinion of the medical witness who attended him in the Cork infirmary was that he died from laceration of the brain, attributable to the wound on his head.

The Recorder was of opinion, and held, that the accident arose out of and in the course of deceased's employment, and he also found that the accident was attributable to the deceased's being

Appeal. heavily under the influence of drink, and that this was serious and
 1913. wilful misconduct having regard to the nature of the duties he
 MURPHY had to perform; but that as the Act said that conduct of this kind,
 r. where the injury is attributable to it, is not to be a bar to compen-
 COONEY. sation where the injury results in death, he held that the dependents
 were entitled to compensation, and awarded £110.

Hanna, K.C., and Hungerford, for the appellants:—

When Cooney was ordered to go below, the effect of that order was to determine his employment for the time. Having been ordered to go below, and not obeying that order, then anything that happened to him during that time owing to his drunkenness was not a risk incidental to his employment: *Horsefall v. Owners of the Steamship "Jura"* (1). The Recorder has held that the accident was due to his drunkenness; but he thought that, notwithstanding this, as death had resulted, he was bound under the section to give the applicant compensation. But where a workman is killed by an accident due solely to his own intoxication, no compensation is payable: *Frith v. Owners of Steamship "Louisianian"* (2). Serious and wilful misconduct cannot bring within the sphere of the employment an act outside the sphere of employment: *Weighill v. South Hetton Coal Co.* (3).

James O'Connor, K.C., and G. J. Daly, for the respondent:—

Where death or serious disablement results, the fact that the workman has been guilty of serious and wilful misconduct will not take away the right to compensation: sect. 1, sub-s. 2 (c). The workman here was obeying the master's orders, though in a dilatory way. Going down the ladder was a risk incident to his employment, and even though he would not have been killed in going down the ladder but for his own drunkenness, the right to compensation is not thereby taken away: *McCaffrey v. Great Northern Railway Co. (Ir.)* (4).

[They also referred to *Grant v. Glasgow and South-Western Railway Co.* (5); *Mitchell v. Glamorgan Coal Co.* (6).]

(1) [1913] W. C. & Ins. Rep. 183.

(2) [1912] 2 K. B. 155.

(3) [1911] 2 K. B. 757.

(4) 36 I. L. T. R. 27.

(5) 1 Butt. W. C. C. 17.

(6) 23 T. L. R. 588.

O'BRIEN, L.C. :—

Appeal.
1913.

MURPHY
v.
COONEY.

In this case we think that the decision of the learned Recorder ought to be reversed. The onus of proof lies on the applicant; and, taking all the facts of the case, as stated, I should say this accident arose out of nothing—so far as the evidence goes—except the misconduct of the deceased. I think the manner in which the matter is put by Lord Justice Buckley in *Frith v. Owners of the "Louisianian"* (1) is clear and practical :—" If the accident arises out of the employment, and death results, it is immaterial that there was misconduct. If the accident arises out of the misconduct, that does not bring the case within the Act."

It would have been competent for the applicant to show that the accident was not solely due to misconduct. But there is no evidence that I can see that that was so. The workman came to the vessel in such a condition of drunkenness that he was ordered to go away; at that time he was not fit for the ordinary discharge of his duties, and there was no necessity for him to remain on the bridge. The accident might have happened by falling in a multitude of ways, but so far as we can judge from the evidence, it was attributable solely to the deceased being heavily under the influence of drink. It seems to me that *Frith's Case* (1) is a clear authority applicable to this case, and even if it did not exist I should be glad so to decide myself.

HOLMES, L.J. :—

I concur. The Recorder has found that the accident is to be attributed to the very drunken state in which the deceased was. That is not only in accordance with the evidence, but, indeed, any other finding would be repugnant to it. The Recorder, however, has also found that the accident occurred in the course of, and arose out of, his employment. I think there must have been some confusion in his mind as to that. I turn to the evidence

(1) [1912] 2 K. B. 155.

Appeal. to see if there was anything to support that finding, and I find
 1913. none. The deceased was ordered off the deck by the master in
 MURPHY consequence of his drunken state and his consequent incapacity to
 v. do his duty ; but he did not go. He remained for several minutes
 COONEY. talking nonsense. No one saw him fall down the steps ; and
 Holmes, L.J. although he was seen near them, the first thing that was noticed a
 minute afterwards was the noise of his fall. He received a hurt
 from which his death followed. The Recorder had no evidence
 before him to show that it arose out of his employment ; but, on
 the other hand, he had abundant evidence to support his other
 finding that the death was the result of the man's drunken state.

CHERRY, L.J. :—

I concur. I do not think that there was any evidence that the accident arose "out of" the employment of the deceased. It might possibly be considered to have occurred in the course of his employment. But, in my opinion, the order of the captain to him to go below, on the ground that he was unfit to discharge any of his duties, was sufficient to determine his employment for the time being. However this may be, on the more reliable ground that there is no evidence that the accident arose out of his employment, I think the decision of the learned Recorder cannot be sustained.

Solicitors for the applicants : *Messrs. J. & J. Bennett.*

Solicitors for respondent ; *J. J. Hogan.*

J. M.

COUNIHAN v. SCARIFF RURAL DISTRICT
COUNCIL (1).

K. B. Div.

1914.

 Jan. 21, 22,
26.

Local Government—Labourers (Ireland) Acts—Cottage let to labourer by sanitary authority—Agreement by lessors to keep in repair—Cottage becoming unfit for habitation—Right of action upon agreement—Cottier tenancy—Statutory remedy to withhold rent not exclusive remedy—Labourers (Ireland) Act, 1883 (46 & 47 Vict. c. 60), s. 13—Landlord and Tenant Law Amendment Act (Ireland), 1860 (23 & 24 Vict. c. 154), s. 83.

By the Labourers (Ireland) Act, 1883, sect. 13, the power of a sanitary authority to make lettings of cottages erected by them under the Act is “upon such terms and conditions that the tenancies created by such lettings shall be cottier tenancies within the meaning of the Landlord and Tenant Law Amendment Act, 1860.” By s. 83 of the latter Act the landlord of a cottier tenancy is bound to keep and maintain the house in tenantable condition and repair; and in case it shall be proved that by the landlord's default it is unfit for occupation by reason of the want of such repairs, “no rent or compensation for the occupation of the said tenement during the time it shall continue in such state and condition shall be recoverable.”

The defendants, a sanitary authority, having acquired a plot of land under the Labourers (Ireland) Acts, and erected a cottage on it, let the cottage to the plaintiff, an agricultural labourer, by an agreement in writing which provided that the lessors should keep the premises in tenantable condition and repair during the tenancy. The defendants allowed the cottage to get into disrepair, so that it became unfit for habitation.

Held, that the plaintiff had a right of action against the defendants for damages for breach of the agreement to keep in repair, and was not confined to the statutory remedy given by the Act of 1860.

CASE STATED by Boyd, J., on the hearing before him, at the Summer Assizes, 1913, for the county of Clare, of an appeal from a decree of the County Court Judge.

The civil-bill process was issued for £20, “£15 thereof being damages for that the plaintiff being tenant to the defendants of a labourer's cottage at Feakle, the defendants by agreement in

(1) Before PALLES, C.B., and GIBSON, and DODD, JJ.

K. B. Div.
1914.
COUNIHAN
v.
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writing covenanted and agreed that they would keep the said house and premises in tenantable condition and repair, yet the defendants failed to do so, and by reason thereof the house and premises got into bad repair, and the plaintiff suffered loss and damage in consequence thereof; and the remaining £5 being for work and labour done and performed by plaintiff for the defendant's use in the erection of a double stone wall around the plot of ground attached to said house."

The following facts were proved or were admitted:—

The plaintiff was a labourer within the meaning of the Labourers (Ireland) Acts, 1883–1906, and the defendants were the sanitary authority for the rural district of Scarriff, in which the aforesaid cottage was situated.

The defendants by agreement in writing dated 21st December, 1891, let to the plaintiff a cottage and plot erected and acquired by them under the Labourers (Ireland) Acts. The cottage and plot were let at the weekly rent of one shilling, and the agreement provided that: "The guardians shall keep the said premises in tenantable condition and repair, during the tenancy, they having liberty for themselves and their officers to enter at all reasonable times for that purpose, and to view the said premises."

The defendants, in breach of the said agreement, since the letting to the plaintiff allowed the cottage to get into disrepair; and Boyd, J., found that, owing to the want of repair to the chimney and the windows and floor of the house, it was not in tenantable repair and condition, and was practically not fit for human habitation. It was also proved that the plaintiff had, on many occasions, requested the defendants to have the defects remedied, and that such complaints had not been attended to by the defendants. Boyd, J., also found that the boundary wall had been erected by the plaintiff for the use of the defendants, and that the plaintiff was entitled to £15 on foot of his causes of action.

Counsel for the defendants contended that the defendants were not liable to the plaintiff, on the ground that the remedy provided by sect. 83 of the Landlord and Tenant (Ireland)

Act, 1860, excluded all other remedies for breach of the above-mentioned agreement, and on that point a case was stated, the question for the opinion of the Court being:—"Is the plaintiff debarred from succeeding by civil-bill process by reason of the provisions of sect. 83 of the Landlord and Tenant (Ireland) Act, 1860?"

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COUNCIL.

G. C. Cullinan (with him, *H. D. Conner, K.C.*), for the plaintiff:—

Sect. 13 of the Labourers (Ireland) Act, 1883, prescribes the conditions on which the lettings of cottages and plots shall be made by the sanitary authority, and enacts that it shall be the duty of such authority to make lettings of the tenements erected or acquired by them under the Act upon such terms and conditions "that the tenancies created by such lettings shall be cottier tenancies within the meaning of the Landlord and Tenant Law Amendment Act (Ireland), 1860." It is provided by the Act of 1860, sect. 83, that the landlord of a cottier tenancy shall be bound to keep and maintain the dwelling-house in tenantable condition and repair; and in case it shall be proved that the dwelling-house was, by the landlord's default, unfit for occupation by reason of the want of such repairs, "no rent or compensation for the occupation of the said tenement during the time it shall continue in such state and condition shall be recoverable." In this case the contractual obligation imposed by the agreement is not superseded by the statutory right conferred upon the tenant of withholding rent so long as the house continues unfit for habitation. It would not afford much protection to the tenant if his only remedy was to give up his tenancy, and turn out, after he had been injured by the improper condition of the dwelling: *Walker v. Hobbs & Co.* (1), per Lord Coleridge, C.J., at page 460. Looking at the general scope of the Labourers Acts, and the nature of the penalty imposed for breach of the statutory duty by sect. 83 of the Act of 1860, it cannot be said that the Legislature intended the statutory remedy to be the only

K. B. Div. remedy: see *Reg. v. Leicester Union* (1); *Groves v. Winborne* (2).
 1914. The intention of sect. 13 of the Labourers Act, 1883, was solely to
 COUNIHAN render it easy for the sanitary authority to determine the tenancy:
 v. *Local Government Board v. Eivers* (3), per Lord O'Brien, L.C.J.,
 SCARIEF at page 266. No remedy in the sense of redress for a wrong is
 RURAL given to the tenant by sect. 83 of the Act of 1860.
 DISTRICT
 COUNCIL.

M. Comyn and Ronan, K.C. (with them *Lynch, K.C.*), for the defendants:—

The Labourers Act, 1883, sect. 13, having imposed a statutory obligation on the defendants to create cottier tenancies, the contract becomes the statutory form of contract, with a special code applying to it, including sect. 83 of the Act of 1860, and the consequence of a violation of the contract by the landlord is that provided by sect. 83, namely, the right of the tenant to withhold rent; the effect of that section is to take away any right of action on the agreement to keep in repair. There are a number of cases showing that rights existing at common law have been taken away by statute without express words to that effect: *London and Brighton Railway Co. v. Watson* (4); *Wolverhampton New Waterworks Co. v. Hawkesford* (5); *Watkins v. Great Northern Railway Company* (6); *Lamlugh v. Norton* (7); *Rankin v. Mullen* (8); *Hally v. Lane-Fox* (9). These show that the remedy given by the code is the exclusive remedy. The remedy under the agreement is merged in the remedy given by the statute. The policy of the law is that there shall not be two subsisting remedies: Leake on Contracts, 6th ed., p. 681; *Price v. Moulton* (10), per Moule, J., at p. 574. The specific breach alleged here, namely, that the cottage was, by the landlord's default, unfit for occupation, is provided for in sect. 83 by a specific remedy. When a cottier tenancy is determined by a landlord, compensation shall be paid to the tenant for crops, and sect. 82 provides that the amount may be recovered

(1) [1899] 2 Q. B. 632.

(2) [1898] 2 Q. B. 402.

(3) [1902] 2 Ir. R. 262.

(4) 4 C. P. D. 118.

(5) 6 C. B. (N. S.) 336.

(6) 16 Q. B. 961.

(7) 22 Q. B. D. 452.

(8) 18 Ir. L. T. R. 40.

(9) 18 Ir. L. T. R. 54.

(10) 10 C. B. 561.

by civil-bill process. Sect. 83 also creates a right, but it does not say that it is to be enforced by civil-bill process.

Cullinan, in reply.

Cur. adv. vult.

PALLES, C.B. :—

The question for decision is, whether sect. 83 of the Landlord and Tenant Law Amendment Act (Ireland), 1860, prevents an action being brought against the lessors of a labourer's cottage for breach of their agreement to keep the cottage in tenantable condition and repair in a case in which, by such want of repair, the cottage is rendered unfit for occupation.

By the Labourers (Ireland) Act, 1883 (46 & 47 Vict. c. 60), sect. 13, the power of the sanitary authority to let labourers' cottages is "upon such terms and conditions that the tenancies created by such lettings shall [with the exception of the rents to be reserved] be cottier tenancies within the meaning of the Act of 1860," and the letting in the present case complies with that provision.

These cottier tenancies were first constituted by this Act of 1860, and are governed by an exceptional code of legislation which is contained in its 81st to 89th sections.

It is a code peculiarly favourable to the lessor, as it confers a jurisdiction upon justices to make summary orders for recovery of possession in cases either of waste or of non-payment of rent, and it is one of the essential conditions of being within the code that by the agreement for letting (which is to be in writing) the landlord shall "undertake to keep and maintain the . . . cottage in tenantable condition and repair."

The importance attached by the Legislature to this provision (one which at the time was most unusual, if not absolutely novel, in Ireland) is emphasized by sect. 83 of the Act, which shows that the Legislature was not content to allow the obligation thereby created to rest in agreement only, but imposed a statutable obligation to the same effect, with a penalty upon the landlord of suspending the rent, so long as the cottage should, by the landlord's default, continue to be unfit for occupation by reason of the want of such repair.

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1914.

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SCARIFF
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Palles, C.B.

To be then "a cottier tenancy" there must be—1, this agreement by the landlord to repair, carrying with it an obligation to the tenant *prima facie* enforceable by action; 2, a statutory obligation which, it appears to me, is made to subsist by reason of, and which is superadded to, the obligation by agreement, and to differ from it only by being an obligation *to all persons*, as distinguished from the obligation under the agreement which is to the tenant only (and which may be of importance in cases of personal injury caused by want of repair: *Cavalier v. Pope* (1); *Ryall v. Kidwell* (2)); and 3, a suspension of the rent during the period of default.

These two statutable consequences so far depend upon the existence of this term of the agreement that, by a release by the tenant of that term, the statutory obligation and the suspension of the rent would be at an end, the tenancy would cease to be a "cottier tenancy," and as the power to let is confined to letting as a cottier tenancy, the tenancy and the agreement by which it was created would come to an end.

Thus it is clear that it is essential to the continuance of the tenure that the term in the agreement of tenancy that the landlord should repair should continue to exist as a term of the agreement; and if it so continues, I can see no reason why an action should not lie for its breach.

The argument for the defendant is, that in cases within the statutory obligation—that is, in cases in which there is not only a breach of the undertaking to keep in tenantable repair, but in which the want of repair is such that by reason thereof the "cottage is unfit for occupation"—the remedy under the agreement is merged in the statutory obligation, and the remedy for breach of the statutory obligation is confined to what is called the remedy provided by the section, *i.e.*, the suspension of the rent.

I express no opinion as to whether a breach of the agreement is not identical with a breach of the statutory obligation. But were it so, as Mr. Ronan argues, we should have this extraordinary state of facts, that for default of repair to such an extent as would not render the cottage unfit for occupation an action on the

(1) [1906] A. C. 428.

(2) [1913] 3 K. B. 123.

agreement would lie and damages would be recoverable; but when the want of repair had increased to such an extent that the cottage became unfit for occupation, then an action would not lie, and the tenant should rest content with the suspension of the rent, and the landlord should be relieved from the damages which he should have been liable for had the want of repair been less extensive. To my mind such a result is impossible. There is no possible relation between the damages recoverable and the rent rendered irrecoverable. The learning as to merger is inapplicable. That there should be a merger it is essential that the obligations occur at different times. Here they both arise at the same moment of time, that of the execution of the agreement. The real question is—one usually inapplicable in cases of merger—the question of intention. Are we to impute to the Legislature the fanciful intention which Mr. Ronan relies on? I cannot find a trace of such an intention. I think the intention very plain: it was to superimpose upon the landlord an *additional obligation*, and not to substitute the statutory obligation for that under the agreement, the continuance of which, in all its essential terms, was, as I have shown, essential to the continuance of the tenancy.

It is unnecessary to discuss the cases cited; none of them have any application here.

I entertain no doubt that in answer to the question put to us we must hold that the 83rd sect. affords no answer to the civil bill.

GIBSON, J.:—

I concur. Whatever may be the object of sect. 83, whether it may be to enlarge contractual liability which would only operate *inter partes*: *Ryall v. Kidwell* (1), or to preclude the possibility of such liability being released, or to superadd a positive statutory obligation, the section cannot be read as displacing the contract made imperative by sect. 81, and substituting for it a statutory duty. If the contract remains in force, the cesser of rent cannot be construed as an answer to breach of such contract.

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1914.
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Gibson, J.

Taking the duty, however, to be statutory only, and adopting Mr. Ronan's construction that a house might not be in tenantable repair without being at the same time unfit for habitation, the absurdity pointed out by my Lord would arise.

However the section may be interpreted, the loss of rent is an automatic penalty, not a remedy; it does not purport to be, and is not, a satisfaction for damage resulting from violation of the obligation, which obviously might largely exceed the trifling rent of a cottier holding. If inmates, members of the cottier's family, could claim the benefit of the obligation, the provision as to rent ceasing could not possibly affect their right. And if the obligation only operates in the tenant's favour, such cesser is not compensation co-extensive with the tenant's claim to damages.

Dodd, J., concurred.

Solicitors for the plaintiffs: *Molony & Pilkington.*

Solicitor for the defendants: *J. B. Lynch.*

C. L.

THE KING (SHIELDS) *v.* THE JUSTICES OF
TYRONE (1).

K. B. Div.

1913.

Jan 24.

Justices—Summary jurisdiction—Application of Petty Sessions (Ireland) Act, 1851, to the Charitable Loan Societies (Ireland) Acts—Warrant—Jurisdiction of justices to re-issue—Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93)—Charitable Loan Societies (Ireland) Acts, 1843, 1900, 1906 (6 & 7 Vict. c. 91; 63 & 64 Vict. c. 25; 6 Edw. 7, c. 23).

The decision in *Atthill v. Woods* ([1903] 2 I. R. 305), and the enactment in s. 1, sub-s. 1, of the Charitable Loan Societies (Ireland) Act, 1906, establish that the provisions of the Petty Sessions (Ireland) Act, 1851, apply to proceedings under the Charitable Loan Societies (Ireland) Acts; and therefore the power given to a justice by s. 33 of the Petty Sessions Act to re-issue a warrant, or issue a fresh warrant, applies to distress warrants issued under the Charitable Loan Societies (Ireland) Acts.

The jurisdiction given by s. 33 of the Petty Sessions Act to re-issue a warrant, or issue a fresh warrant, is not limited to the cases mentioned in the section of the person to whom the warrant was addressed being unable to find the person against whom the warrant issued or his goods, or to discover where such person or his goods are to be found. The jurisdiction may be exercised although the person to whom the warrant was addressed has not given the certificate mentioned in the section stating the reasons why the warrant was not executed, and without such person being examined on oath touching the non-execution of the warrant.

The jurisdiction given by the section is not necessarily confined to the first warrant.

CERTIORARI.

Motion to make absolute a conditional order for a writ of certiorari directed to the justices of the peace for the county of Tyrone, to remove into the King's Bench Division for the purpose of being quashed a warrant dated the 12th May, 1912.

On the 6th July, 1907, the justices for the county of Tyrone, sitting at petty sessions for the petty sessions district of Castlederg, on the hearing of a summons in which the treasurer of the Killeter

(1) Before PALLES, C.B., and MADDEN and WRIGHT, JJ.

K. B. Dir. 1913. Loan Fund Society was complainant, and Edward Shields, the prosecutor herein, and Peter McCormick and Charles McMenamin, were defendants, for the repayment of money lent pursuant to 6 & 7 Vict. c. 91, and for interest on the loan under the rules of the society and pursuant to the provisions of 63 & 64 Vict. c. 25, and 6 Edw. 6, c. 23, made an order against the defendants for the debt, £14 5s., and for costs, 12s. 6d. to be paid by quarterly instalments of £3 14s. 4½d., a warrant to issue for the full amount on failure to pay any instalment. A warrant in execution of the order was issued by the justices at the Castlederg petty sessions, on the 30th September, 1907. The warrant was entitled "Pursuant to 14 & 15 Vict. c. 93, 6 & 7 Vict. c. 91, 63 & 64 Vict. c. 25, and 6 Edw. 7, c. 23." The warrant was issued to Robert Harpur, a civil-bill officer, for execution. In the month of April, 1908, as Robert Harpur was not making any effort to execute the warrant, the receiver of the Killeter Loan Fund Society, Mr. Nugent, on the instruction of the Loan Fund Board, required Harpur to return the warrant to the Court, and on his failure so to do issued a summons against Harpur for the petty sessions for June, 1908. The summons came on for hearing on the 6th June, 1908, at Castlederg petty sessions, when Robert Harpur was ordered to furnish a proper return, and the case adjourned to the following Court day. On that day, the 4th July, 1908, Harpur was ordered to lodge all warrants in his possession with the officer of the Court. Harpur did so, having endorsed upon some of the warrants the amounts collected, and on others "no goods." Upon the warrant against the prosecutor, McCormick, and McMenamin, there was no endorsement whatever, and Harpur did not return or give any such certificate in the Form G (a) as is mentioned in sect. 33 of the Petty Sessions Act, 1851, nor any certificate. The warrants for the execution of orders made at the suit of the Loan Fund Society were checked over by Mr. Nugent, and, where any amounts were endorsed as paid, credits were given by him in his books; and on the 7th November, 1908, through his solicitor, Mr. Nugent applied that the warrants should re-issue to the constabulary. The application was refused by the magistrates, who said they would select a bailiff, and, ultimately, after some delay and threat of proceedings by *mandamus*, the magistrates

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appointed one Thomas Kelly as bailiff, and the warrants returned by Harpur were re-issued to Kelly to execute. Thomas Kelly, having taken no steps to execute the warrants re-issued to him, Mr. Nugent applied to the justices for an order upon Kelly to return these warrants. The order was made on the 6th May, 1911, and subsequently Kelly returned the unexecuted warrants, including the warrant against the prosecutor, McCormick, and McNemamin, but without any certificate. These warrants were then re-issued to the constabulary for execution; but, upon hearing that they objected to executing them because they were irregular, Mr. Nugent, by his solicitor, applied, on the 3rd February, 1912, to the justices at Castlederg petty sessions, for the issue of warrants directed to the police, and on the 12th March, 1912, the warrant which it was sought to quash, entitled "Pursuant to 14 & 15 Vict. c. 93, 6 & 7 Vict. c. 91, 63 & 64 Vict. c. 25, and 6 Edw. 7, c. 23," and addressed to the District Inspector of Royal Irish Constabulary at Strabane and his assistants, was issued by the justices in execution of the order of 6th July, 1907. The warrant of the 30th September, 1907, was signed by Mr. Devine, one of the justices who had heard the summons; that of the 12th March, 1912, was signed by Mr. O'Neill, another justice, who, it was stated in the affidavit grounding the motion for the conditional order, was not a justice who adjudicated in July, 1907. Save that the warrants were differently addressed, and that the former contained an endorsement, "Collect £14 17s. 6d.," the two warrants were practically identical.

The conditional order was obtained on the 11th June, 1912, upon the following grounds:—“(1) That the said warrant is bad on its face. (2) That the said warrant is not signed or sealed by the justices who heard and decided the case, as required under the provisions of 6 & 7 Vict. c. 91. (3) That the said warrant was made without jurisdiction, and in excess of jurisdiction. (4) That the said warrant was made in substitution of another warrant, and does not contain the necessary averments to make such warrant valid. (5) That a former warrant for the same purpose, dated the 30th September, 1907, was not returned before the issuing of the said warrant. (6) That the provisions of sect. 33 of the statute 14 & 15 Vict. c. 93, were not complied

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K. B. Div. with before the issuing of the said warrant. (7) That the said
 1913. warrant on its face does not show the necessary jurisdiction.
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 after the order of the 6th July, 1907. (9) That the delay has
 been unreasonable. (10) That the said warrant is not in the
 form in the statute in that behalf made and provided. (11) That
 the warrant has no endorsement on the back. (12) That there
 was no jurisdiction to issue the said warrant without proper
 inquiry whether the order of the 6th July, 1907, and the
 warrant made thereunder of the 30th September, 1907, remained
 unsatisfied."

The evidence before the Court was contained in the affidavits
 of Mr. Elliot Nelson, solicitor for the prosecutor, upon which
 the motion for the conditional order was grounded, and an
 affidavit by Mr. Nugent, and the documents exhibited in these
 affidavits.

James O'Connor, K.C. (with him, *Weir Johnston*), for the
 prosecutor:—

At common law there would be no jurisdiction to withdraw
 a warrant good upon its face; once it is issued the jurisdiction
 is spent. If the Petty Sessions (Ireland) Act, 1851, applies, it
 abrogates any common-law right there might be to issue more
 than one warrant in execution of the same order. Either the
 Petty Sessions (Ireland) Act, 1851, applies, or it does not.

If the Petty Sessions (Ireland) Act, 1851, applies to proceed-
 ings under the Charitable Loan Societies (Ireland) Acts, the
 procedure as to warrants and their issue is regulated by sects. 23,
 25, and 33 of the former statute. Under sect. 23, in a civil case
 where the party in whose favour the order has been made, or some
 person on his behalf applies, a justice, where the order has
 not been complied with, may issue a warrant for its execution.
 Under sect. 25, sub-s. 2, the warrant, in the discretion of the
 justice, may be addressed for execution either to a special bailiff
 or to the police. Sect. 33 deals with the return of warrants, and
 provides that where the bailiff is unable to discover the person
 against whom the warrant is issued, or his goods, or where such
 person or goods may be found, he shall return the warrant to

the justice by whom it was issued, either within the time limited for return by the warrant, or, where no such time is limited, within a reasonable time, together with a certificate of the reasons for non-execution in the form G (a) provided by the schedule to the Act. The form given in the schedule is for the case where the bailiff has been unable to find the person against whom the warrant has been issued. Sect. 33 further provides that the justices or justice to whom the warrant is returned may examine the bailiff on oath touching his reasons for not executing the warrant, and may re-issue the warrant or issue any other warrant for the same purpose. Here there was no certificate. Mr. Nugent's affidavit states that Harpur made no endorsement of payment, or of "no goods," or of anything, upon the warrant against the prosecutor. The justices no doubt had discretion to issue the warrant to Harpur, or the police; but once they had issued the warrant, that discretion was spent; if they wished to re-issue the warrant, or to issue a new warrant, they could only do so under and in accordance with the provisions of sect. 33. They did not do what they were required to do under that section; they ignored it; and they did not even consider whether Harpur or Kelly was recalcitrant.

Assuming on the other hand that the Petty Sessions (Ireland) Act, 1851, does not apply, in that case also this warrant is bad. It is not signed by one of the justices who made the order of July, 1907. A number of sections of the Charitable Loan Societies (Ireland) Acts show that the Petty Sessions (Ireland) Act, 1851, does not apply to summary proceedings under those statutes. Under the Charitable Loan Societies (Ireland) Act, 1843 (6 & 7 Vict. c. 91), ss. 30 & 31, (a) there is a peculiar enlargement of the jurisdiction of the justices; (b) the place of hearing may be either at petty sessions or not; (c) the form of warrant is like the form of a county court decree; (d) the person to sign the warrant must be a justice who heard and determined the complaint; (e) the costs are expressly limited to 2s.; and (f) there is no appeal. The Charitable Loan Societies (Ireland) Act, 1900 (63 & 64 Vict. c. 25), expressly provided by sect. 3 that the provisions of sect. 22 of the Petty Sessions (Ireland) Act, 1851, as to payment by instalments and as to costs should

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K. B. Div. apply, and by sect. 6 of the Charitable Loan Societies (Ireland)
 1913. Act, 1906 (6 Edw. 7, c. 23), a special right of appeal was given.
REX Sect. 23 of the Petty Sessions (Ireland) Act, 1851, which deals
(SHIELDS) with the issue of warrants, is introduced by the general words,
v. "in all cases of summary jurisdiction"; but if those words have
JUSTICES OF the effect, in that section, of bringing in under that statute the
TYRONE. proceedings under the Charitable Loan Societies (Ireland) Acts,
 then the same words, which introduce sect. 22 of the Petty Sessions
 (Ireland) Act, 1851, must have the same intendment. But we
 find that it was thought necessary by the Legislature specifically
 to enact that sect. 22 should apply; the conclusion is that
 without such express enactment the general words "in all cases,"
 &c., could not have the effect of applying the statute, and that
 therefore, where no special enactment has applied the provisions
 of the Petty Sessions (Ireland) Act, 1851, to these proceedings
 under the Charitable Loan Societies (Ireland) Acts, such
 proceedings are regulated alone by these latter statutes. There
 are many cases in which it has been held that proceedings by
 summary jurisdiction are not within the Petty Sessions Act, as,
e.g., an order to enter a quarry : *R. (De Vesci) v. Queen's Co. JJ.* (1),
 and attendance orders under the Irish Education Act, 1892 :
Glasgow v. Henry (2).

Denis Henry, K.C., and *Wylie*, for the justices :—

The governing words of sect. 30 of the Charitable Loan Societies (Ireland) Act, 1843 (6 & 7 Vict. c. 91), are "any one of Her Majesty's justices of the peace having jurisdiction in the county." Read in that view, the section draws a distinction between adjudication and execution, and the warrant can be signed by any justice coming within the governing words, although he may not have been one of the adjudicating justices. The Petty Sessions (Ireland) Act, 1851, however, applies, and provides an additional remedy. That was decided in 1903 by a strong Court, after a considered judgment, in *Atthill v. Woods* (3),

(1) [1908] 2 I. R. 285.

(3) [1903] 2 I. R. 305.

(2) 41 I. L. T. R. 245.

where it was held that the limitation of time in sect. 10, sub-s. 4, *K. B. Div.* 1913.
of the Petty Sessions (Ireland) Act, 1851, applied to proceedings
under the Charitable Loan Societies (Ireland) Acts. That decision
has been adopted by the Legislature, for sect. 1 of the Charitable
Loan Societies (Ireland) Act, 1906 (6 Edw. 7, c. 23), deals with
the application of sect. 10, sub-s. 4, of the Petty Sessions (Ireland)
Act, 1851, as in force. The warrant here, being within the
jurisdiction of the justices under sect. 23 of the Petty Sessions
(Ireland) Act, 1851, and being good upon its face, cannot be
quashed. There are not two warrants; the Court has changed
the bailiff. Sect. 33 of the Petty Sessions (Ireland) Act, 1851,
is not exhaustive as to the cases in which a warrant may be
re-issued; if it were, the cases where the bailiff died before
execution, or was forced to destroy the warrant, would not be
included. [They referred to *Grove v. M'Elhinney* (1); *Keppel v.*
Ryan (2); *R. (Wrice) v. Monaghan Urban District Council* (3).]

Weir Johnston, in reply.

PALLES, C.B.:—

This case has been well argued, but there is no reason why we should reserve judgment upon it. Two points were argued before us. The first was whether the Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), applied in this case. There is an absolute decision as to this in the case of *Atthill v. Woods* (4), and there is an Act of Parliament (6 Edw. 7. c. 23) of the year 1906, which almost amounts to a statutory declaration that that decision was right, and that the procedure under the Charitable Loan Societies (Ireland) Acts is within the provisions of the Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93).

The second point argued is a more difficult one, and, to my mind, raises a rather nice question. It is whether, assuming that the Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93),

(1) 26 I. L. T. R. 34.

(2) 20 L. R. Ir. 575.

(3) 38 I. L. T. R. 218.

(4) [1903] 2 I. R. 305.

K. B. Div. applies, there was jurisdiction in the justices to issue a second warrant, under sect. 33 of that Act. That section provides as follows:—"Whenever the person to whom any warrant shall be so addressed, transmitted, or endorsed for execution, shall be unable to find the person against whom such warrant shall have been issued, or his goods, as the case may be, or to discover where such person or his goods are to be found, he shall return such warrant to the justices by whom the same shall have been issued within such time as shall have been fixed by such warrant (or within a reasonable time where no time shall have been so fixed), and together with it a certificate (*G a.*) of the reasons why the same shall not have been executed." The section continues, "and it shall be lawful for such justice to examine such person on oath touching the non-execution of such warrant, and to re-issue the said warrant again, or to issue any other warrant for the same purpose from time to time as shall seem expedient."

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Now, the jurisdiction given under that section is not necessarily confined to the first warrant, and what we have to determine is whether the words, "it shall be lawful for such justice . . . to re-issue the said warrant again, or to issue any other warrant for the same purpose," are confined to the cases mentioned in the section, or merely regulate the existing jurisdiction of the Court to make these orders effective. I am of opinion that they are not so confined, but that the Court which has power to make the order for payment and to issue a warrant or process of execution to satisfy the judgment, has power to make the execution effective not only by issuing a warrant of execution, but, where it is satisfied that that issue has not been effective, by issuing another warrant. This proposition is only contested by seeking to limit this right of the Court to the cases mentioned in the section. I am of opinion that it cannot be so limited, because there then would be no provision for the case of the person to whom the warrant was addressed dying, or, as was frequent in Ireland at the time when the Act was passed, of a bailiff being forced to destroy the warrant. Neither of these cases is mentioned in the section.

For these reasons we are of opinion that the conditional order *K. B. Div.*
should be discharged. 1913.

MADDEN and WRIGHT, JJ., concurred.

Solicitor for the prosecutor: *Thomas Elliot Nelson.*

Solicitors for the justices: *Dickie & Carson.*

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GILLMAN v. BOURKE AND OTHERS (1).

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Practice—Civil bill—Removing into Superior Courts—Ejectment for non-payment of rent—37 & 38 Vict. c. 66, s. 2—Rentcharge—Remedies for recovery of—14 & 15 Vict. c. 20—Retrospective operation.

Nov. 14.

A civil-bill ejectment for non-payment of rent is not within the provisions of s. 2 of 37 & 38 Vict. c. 66, and an order cannot be made for the trial of such ejectment in the Superior Courts.

Semble, the remedies for the recovery of rentcharges given by 14 & 15 Vict. c. 20, apply to rentcharges created before the passing of the Act.

SUMMONS.

Application on the part of the defendants, that the plaintiff show cause why the proceedings in the County Court in respect of two civil-bill ejectments for non-payment of rent, brought by the plaintiff against the defendants, should not be stayed, in order that the matters in issue should be tried in the Superior Courts, or in the alternative that the records be transferred to the High Court of Justice in Ireland, and that all further proceedings be had there.

By two indentures, purporting to be by way of lease, dated respectively the 9th March, 1791, and the 15th September, 1795, the premises sought to be recovered by the civil bills had been demised by predecessors in title of the plaintiff to predecessors in title of the defendants, for terms of 9999 years and 999 years respectively, at the respective yearly rents of £7 10s. and £24.

K. B. Div. At the date of these leases the respective lessors held the lands under a lease for a term of 99 years determinable upon three lives with a covenant for perpetual renewal. This lease had been converted into a fee-farm grant in the year 1868.

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The affidavit of the defendants' solicitor on which the present application was grounded set out matters going to show that the title to the lands was of a complicated character, and that the decisions on the civil-bill ejectments would affect the title to lands the annual valuation of which was £157 5s.

Serjeant Sullivan, K.C. (with him *Timothy Sullivan*), for the defendants :—

The application is based on sect. 2 of 37 & 38 Vict. c. 66 (1). Lands of greater value than £20 will be affected by the decision in the present case. This section is extended to ejectments on the title by s. 54 of 40 & 41 Vict. c. 56. Here the plaintiff is really contesting the title to a wide tract of land. In *Nolan v. Cullen* (2) a civil-bill ejectment for overholding was brought up.

The instruments of 1791 and 1795, though purporting to be sub-leases, were in reality assignments, inasmuch as they were for terms greater than the term for which the lessors themselves held, and the rents reserved were merely rentcharges. The effect of the fee-farm grant of 1868 was to vest in the predecessor in title of the defendants the fee-simple of the lands comprised in these instruments, subject to the rentcharges created by them. As these rentcharges were created before the passing of 14 & 15 Vict. c. 20, and are in respect of lands held in fee-simple, that statute has no application. [He referred to *Pluck v. Digges* (3); *Lessee Porter v. French* (4).]

Norwood, K.C., and *Henry Moloney*, for the plaintiff :—

This Court has no jurisdiction to bring up an ejectment for non-payment of rent under sect. 2 of 37 & 38 Vict. c. 66. That

(1) The material portion of the section is set out in the judgment of Madden, J., *post*, p. 100.

(2) [1901] 2 I. R. 628.

(3) 5 Bligh, 31; 2 Dow. & Cl. 180.

(4) 9 I. L. R. 514.

section only applied to actions involving title to corporeal or incorporeal rights, as to which jurisdiction was for the first time given to the County Court by sect. 1 of the Act. Sect. 54 of 40 & 41 Vict. c. 56, which enacted that sect. 1 of 37 & 38 Vict. c. 66 should include ejectments on the title, would have been unnecessary if sect. 1 of the earlier Act included ejectments of every kind. *Nolan v. Cullen* (1) was decided on the ground that an ejectment for overholding was an ejectment on the title, and thus came within sect. 2 of 37 & 38 Vict. c. 66. An ejectment for non-payment of rent is not an ejectment on the title, but merely a mode of recovering the rent, for the tenant may redeem. See sect. 7 of the Irish Land Act, 1887.

As to the question of the character of these rents, we submit that they are rents service. A lease for a term of years determinable on lives, and with a covenant for perpetual renewal, gives the same estate as a lease for lives renewable for ever: *Boyle v. Lysaght* (2). Such an estate is greater than a term of years, however long. But, even assuming that the rents created by the deeds of 1791 and 1795 were merely rentcharges, the remedy by ejectment is given by 14 & 15 Vict. c. 20. The operation of that statute cannot be restricted to rentcharges created after the passing of the Act. At all events, if there is anything in the point, it can be raised as a defence in the County Court.

Timothy Sullivan, in reply :—

The question of title, as in magistrates' cases, may appear on the face of the proceedings or may appear during them. There is nothing in sect. 2 of 37 & 38 Vict. c. 66 to confine the jurisdiction to any particular class of civil bill. The subsequent section, sect. 54 of 40 & 41 Vict. c. 56, was wholly unnecessary. The title is intricate, and this is not a suitable case to try by civil bill. The remedies given by 14 & 15 Vict. c. 20 apply only to instruments made after the Act, as it is a statute which does not merely regulate procedure, but gives fresh rights. Here the instruments were made prior to the Act. As in the case of Deasy's Act, so 14 & 15 Vict. c. 20 speaks only from the date of its passing.

(1) [1901] 2 I. R. 628.

(2) 1 Ridgeway, 384.

K. B. Div.
1913.

MADDEN, J. :—

GILLMAN
v.
BOURKE.

This is an application made to the Court under sect. 2 of 37 & 38 Vict. c. 66, which is as follows :—

“The defendant in any civil bill in which the title to a corporeal or incorporeal hereditament shall be in question may, at any time after the service of the civil bill on him, apply to a Judge of one of Her Majesty’s Superior Courts of Common Law in Ireland for a summons to the plaintiff to show cause why such action shall not be tried in one of the Superior Courts of Common Law in Ireland, on the ground that the title to lands or hereditaments of greater annual value than twenty pounds as before defined would be affected by the decision in such action, or on any other ground which may make it more proper to have the case tried in any of such Courts.”

The application is on behalf of the defendant in a civil-bill ejectment for non-payment of rent, and it is grounded on the consideration that the right of the plaintiff to recover in such a proceeding involves a question of title to land of such a character as to render it more proper to be tried in the Superior Courts.

The first question for our decision is whether ejectment for non-payment of rent comes within the section which I have quoted, as extended by sect. 54 of 40 & 41 Vict. c. 56, which provides that the words “action in which the title to any corporeal or incorporeal hereditament shall come in question” shall include and may be applied to any action of ejectment upon the title.

The second section of the Act of 37 & 38 Vict. is closely connected with the first. Before the passing of that Act, the 96th sect. of the 14 & 15 Vict. c. 57 was in force, which provided that “the title to lands, tenements, and hereditaments (except in the cases hereinbefore mentioned), shall not be drawn into question in any proceeding by civil bill under this Act.”

The first section of the Act of 1874 gave to the county court a limited and carefully guarded jurisdiction to try actions in which the title to land was called into question. By the first section, in addition to the existing jurisdiction, it was provided that “the chairman of every county . . . shall have jurisdiction to try by civil bill actions in which the title to any corporeal or

incorporeal hereditaments shall come in question, when the value of the land in dispute, or in respect of which an easement or licence is claimed . . . shall not exceed twenty pounds by the year." . . .

K. B. Dir.
1913.
GILLMAN
v.
BOURKE.
Madden, J.

The view that I should take of these two sections, if standing alone, is that the second section is co-extensive with the first, and that in any of the cases in which proceedings could be brought in the county court involving the title to lands, power was given to remove the case into the Superior Court. It would have been a possible construction of the section that it had a wider application, and that it might have included actions of ejectment on the title. But that view was not taken by the Legislature, for by sect. 54 of 40 & 41 Vict. it is expressly enacted that these words shall include actions of ejectment on the title. In *Nolan v. Cullen* (1) it was held that an action of ejectment for over-holding came within this section. This decision, so far from supporting the contention that the section includes ejectments of all kinds, including those for non-payment of rent, is based on the proposition that it is exclusively conversant with ejectments on the title, a class in which what is known as an ejectment for over-holding was held to be included. The question was not whether the words in the section could be extended, but whether the Court would, in the words of Palles, C.B., "cut down those words to cases of ejectment on the title otherwise than for over-holding."

This case has been argued on the assumption that it is vital for the determination of the civil-bill ejectment to decide that the rent, which is admitted for the purpose of the present motion to be due, is a rent service. Serjeant Sullivan succeeded in showing, from his analysis of the complicated transactions between the parties, that this is a question which would be more proper for argument and decision in the Superior Court than in the Civil Bill Court, or on appeal at the assizes. It might be sufficient to say that this Court has no jurisdiction to send it for decision to the Superior Court. But, having regard to the arguments addressed to us, I wish to add that the plaintiff's

(1) [1901] 2 I. R. 628.

K. B. Div. right to recover does not appear to me to depend on the determination of this question. The statute 14 & 15 Vict. c. 20 is an Act which I have often known to be overlooked in practice. It is entitled "An Act to extend the remedies provided by the Renewable Leasehold Conversion Act for the Recovery of Fee-farm Rents under that Act to all other fee-farm rents, and to other rents in Ireland reserved upon grants of land in which the grantors have no reversion." Serjeant Sullivan suggests that this Act applies only to rentcharges created after the passing of the Act. I see no reason why its application should be limited in this way. There were a number of rents in existence which were not technically rents service, but were to all intents and purposes in the same position; and it was considered desirable that the same remedies should be provided for recovery of these rents as were given in the case of rents service. If this statute should be held to apply to the rents with which the present case is conversant, the case will be much simplified. But, whether or not this is so, I am clearly of opinion that we have no power to make the order applied for on the part of the defendant.

KENNY, J., concurred.

Solicitors for the plaintiff: *J. C. & A. Blake.*

Solicitor for the defendants: *P. J. O'Driscoll.*

A. E. C.

THE KING (GRANT) v. THE JUSTICES OF
LOUTH (1).

K. B. Div.
1913.

Oct. 28, 29.

Justices—Summary Jurisdiction—Procedure—Towns Improvement (Ireland) Act, 1854 (17 & 18 Vict. c. 103), ss. 80, 90, 91—Plying for hire with hackney carriage without a licence—Procedure under Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), not applicable—Order of justices imposing imprisonment in default of payment of penalty—Necessity of using words “unless penalty and costs sooner paid”—Certiorari—Costs of unsuccessful prosecutor.

Proceedings before justices to recover the penalty imposed by sect. 80 of the Towns Improvement (Ireland) Act, 1854, on a person found plying for hire with a hackney carriage without a licence, are governed by that Act, and not by the Petty Sessions (Ireland) Act, 1851.

R. (McErlean) v. Justices of Antrim (2 New Ir. Jur. Rep. 256) does not go the length of deciding that, in an order of justices imposing imprisonment in default of payment of a fine, the words “unless the penalty shall be sooner paid” should be in the order, as distinct from the commitment.

G. was charged before justices with plying for hire with a hackney carriage within the prescribed distance without a licence, an offence in respect of which a penalty is imposed by sect. 80 of the Towns Improvement (Ireland) Act, 1854. The justices made an order, which was entered in the order-book, that G. should pay for fine £1 and 5s. for costs, and in default of payment should be imprisoned for fourteen days. The order as entered did not contain the words “unless such penalty and costs shall be sooner paid.” No formal conviction under the hands and seals of the justices, as prescribed by sect. 91 and Schedule C. of the Act of 1854, was drawn up. G. having applied for a writ of certiorari to quash the order as entered in the order-book, on the ground that it was bad on its face:

Held, that the proceedings to cover such penalty were governed by the Towns Improvement (Ireland) Act, 1854, and not by the Petty Sessions (Ireland) Act, 1851, and that certiorari did not therefore lie in respect of the entry in the order-book.

Held, also, that there was no jurisdiction to give G. the costs of the application, but that it should be refused without costs.

The prosecutor, Felix Grant, was defendant in a summons in which the clerk of the urban district council of Dundalk,

(1) Before PALLIS, C.B., and GIBSON and BOYD, JJ.

K. B. Div. acting for the said council, was complainant. The summons
 1913. charged that the defendant on the 1st May, 1913, at Dundalk,
 REX within the prescribed distance, was found driving for hire a
 (GRANT) hackney carriage, same not being duly licensed by the said
 v. council to ply for hire; and that the defendant on that day
 JUSTICES OF council to ply for hire; and that the defendant on that day
 LOUTH. at Dundalk, within the prescribed distance, was found standing
 for hire, with a hackney carriage, same not being duly licensed
 by the said council to ply for hire; and that the defendant on
 that day at Dundalk, within the prescribed distance, was found
 plying for hire with a hackney carriage, same not being duly
 licensed by the said council to ply for hire.

The complaint was heard at the Borough Court for the town of Dundalk, and the justices present made an order which was entered in the petty sessions order-book. The certificate of this order set out as follows :—

“I certify that upon the hearing of a complaint that defendant on the 1st day of May, 1913, at Dundalk, in the county of Louth, within the prescribed distance was found driving, standing, and plying for hire with a certain hackney carriage, to wit a jaunting car, same not being duly licensed by the said council to ply for hire, contrary to the statute in that behalf, an order was made on the 31st day of July, 1913, by the justices present against the said Felix Grant, of Crossmaglen in the county of Armagh, to the following effect, viz. : That defendant pay for fine the sum of £1, for costs 5s., total £1 5s. ; or in default of payment to be imprisoned for fourteen days in Dundalk jail.”

The prosecutor herein obtained a conditional order for a writ of certiorari, to bring up and quash this conviction on the grounds that it was bad on its face, because: 1. The magistrates had no power by the conviction to order imprisonment in default of payment of the fine. 2. That no warrant for distress was ever issued. 3. That the said order omitted the words, “unless said sum be sooner paid.” And that the order was bad for uncertainty. Cause having been shown by the urban district council, the present application was on behalf of the prosecutor to make the conditional order absolute notwithstanding cause.

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K. B. Div.
1913.
REX
(GRANT)
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JUSTICES OF
LOUTH.

Lupton, for the prosecutor :—

The summons is brought for an offence under sect. 80 of the Towns Improvement (Ireland) Act, 1854. That section creates three offences, and all three are charged in the summons, viz., driving for hire, standing for hire, and plying for hire. The conviction is bad for uncertainty, inasmuch as it does not appear from it in respect of which of these offences the fine was imposed.

Further, there was no jurisdiction to order imprisonment in default of payment of the fine. The provisions of the Petty Sessions (Ireland) Act, 1851, do not apply to these offences. The procedure is governed by sects. 90 and 91 of the Towns Improvement Act of 1854, the provisions of which are altogether different from those of the Petty Sessions Act. It is provided by sect. 90 that if the penalty imposed is not paid, it may be levied by distress, and if no sufficient distress can be had, the justices may, “by warrant under their hands and seals,” cause the offender to be committed to jail for a term not exceeding three months unless the penalty and costs be sooner paid. The Small Penalties (Ireland) Act, 1873, removes the necessity of first issuing a distress warrant, but does not otherwise affect the section. Imprisonment therefore can be ordered only by a warrant under the hands and seals of the justices. Sect. 91 prescribes the form of conviction, which is to be in the form in Schedule C to the Act. According to that form the conviction is to be under the hands and seals of the justices. It contains nothing as to awarding imprisonment in default of payment of the penalty.

Even assuming that the Petty Sessions Act applies, the order is bad, inasmuch as the award of imprisonment omits the words, “unless the said sum be sooner paid” : *R. (M^cErlean) v. Justices of Antrim* (1).

(1) 2 New Ir. Jur. Rep. 256.

K. B. Div. 1913. *M'Cann, K.C., and Alfred Dickie, for the Urban District Council of Dundalk:—*

REX
(GRANT)
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LOUTH.

The conviction is good. Driving, standing, or plying for hire is only one offence, not three offences. The imposing of a fine amounts to a conviction: *The King (Conway) v. Justices of Tyrone* (1).

Proceedings before justices under the Towns Improvement (Ireland) Act, 1854, are regulated by the Petty Sessions Act, and a conviction in the form provided by the latter Act is good.

It is not necessary that a conviction directing that in case of default of payment of a penalty the offender shall be committed to prison, should contain the words "unless the penalty shall be sooner paid." These words are immaterial, since the Petty Sessions Act expressly provides that such imprisonment shall be determinable upon payment of the penal sum and costs: sect. 22, sub-s. 3; sect. 32, sub-s. 5. By 62 & 63 Vict. c. 11, on payment of a portion of the fine the term of imprisonment is to be reduced proportionately. The form of conviction prescribed by the petty sessions order-book does not require any such words to be inserted. The words "unless the penalty shall be sooner paid" in sect. 4 of the Small Penalties Act, 1873, deal with the warrant of committal, not the order. It has been supposed that *R. (M'Erlean) v. Justices of Antrim* (2) decides that the words "unless such penalty shall be sooner paid" must appear on the face of the order. But in that case the ground on which the conviction was held bad was that there was no jurisdiction under the statute there in question to order imprisonment at all. The judgment of Palles, C.B., dealing with these words "unless," &c., refers to the warrant and not the conviction. No doubt, in *The King (Burke) v. Justices of Cork* (3), and in *The King (Taverner) v. Justices of Tyrone* (4), it was assumed that a conviction imposing a term of imprisonment in default of payment of a fine was bad unless it contained the words "unless such fine and costs be sooner paid," but the assumption was based on the erroneous view that this had been decided in *R. (M'Erlean) v. Justices of Antrim* (2).

(1) [1906] 2 I. R. 164.

(2) New Ir. Jur. Rep. 256.

(3) [1905] 2 I. R. 309.

(4) [1909] 2 I. R. 763.

Assuming, however, that the Petty Sessions Act does not apply, *K. B. Div.* and that the procedure is under the Towns Improvement Act, 1854, — 1913.
 the entry in the petty sessions order-book is not an order at all, *REX*
 and certiorari does not lie in respect of it : *The King (Ewing) v. The* (GRANT)
Justices of County Down (1). *v.*
JUSTICES OF
LOUTH.

Lupton, in reply :—

I contend that the procedure is under the Towns Improvement Act, 1854. I admit, however, that there is a difficulty in granting certiorari, having regard to the decision in *The King (Ewing) v. The Justices of County Down* (1). If the application is refused on this ground, the costs should be given to the prosecutor.

PALLES, C.B. :—

I have come to the clear conclusion that the procedure ought to have been under the Towns Improvement Act of 1854; and although the question does not in strictness arise here, yet as there appears to have been some misapprehension on the subject, I desire to state that my judgment in *R. (M'Erlean) v. Justices of Antrim* (2) does not go the length of deciding that the words " unless the penalty shall be sooner paid " should be in the order, as distinct from the commitment.

There is no doubt that by sect. 36 of the Petty Sessions Act, 1851, the Legislature intended that the forms prescribed by that Act, and the procedure incident to such forms, should be applicable to proceedings under statutes passed subsequently. But this cannot prevent the Legislature from making a subsequent Act so inconsistent with the provisions of the Petty Sessions Act that those provisions cannot apply. This was the doctrine acted on in *The King (Ewing) v. Justices of Down* (1). Applying it to this case, I am of opinion that there is such an inconsistency between the Act of 1854 and the Petty Sessions Act that the latter Act cannot be held to apply to proceedings under the former Act.

I rely largely on sect. 90 of the Act of 1854. It authorizes a procedure for detaining and keeping in safe custody the person

(1) [1905] 2 I. R. 648.

(2) 2 New Ir. Jur. Rep. 256.

K. B. Div. convicted, until return can be conveniently made to the distress
 1913. warrant. Taking that with the further provisions that the
REX warrant must be under the hands and seals of the justices, and
 (GRANT) that there is no limitation of the sum which may be awarded
v. for costs, whereas under the Petty Sessions Act (sect. 22, sub-s. 9),
 JUSTICES OF the limit is 20s., I am of opinion that the same class of reasoning
 LOUTH. as was adopted by the Court in *Ewing's Case* (1) shows that the
 Palles, C.B. procedure must be under the Act of 1854, and not under the
 Petty Sessions Act.

Now, with respect to the other point, although, as I have said, it does not in strictness arise here, yet as there is some misapprehension as to my decision in *M'Erlean's Case* (2), it may be convenient to the profession to remove it. In that case the conviction was held bad because it ordered imprisonment in default of payment of the fine imposed, there being no jurisdiction under the statute there in question to do so. My judgment, so far as it is reported in reference to the non-qualification of the absolute term of imprisonment, refers to the warrant and not to the conviction.

Taking the Petty Sessions Act by itself, I think that there is a clear distinction between the order the magistrates are to make and the mode in which that order is to be enforced. The magistrates must determine not only that a penalty is to be paid, but also whether in default of payment that penalty is to be enforced by imprisonment, and the length of that imprisonment. The words of sect. 22, sub-s. 3, are, "they may order that in default of the said sum being paid as directed, the said person shall be imprisoned for any term not exceeding the period specified in the following scale." As to whether there shall or shall not be imprisonment, there must be a judicial determination. Taking it therefore under the Petty Sessions Act, there must be, first, a determination of a penalty; and, secondly, a determination whether or not that penalty is to be enforced by imprisonment, and the period of that imprisonment. But how that determination is to be enforced is mere matter of procedure, and not of judicial discretion. It is to be dealt with by a warrant

(1) [1905] 2 I. R. 648.

(2) 2 New Ir. Jur. Rep. 256.

—a committal. The words in sect. 4 of the Small Penalties Act, 1873 (36 & 37 Vict. c. 82), are, “may be *committed* to prison for any term not exceeding the periods specified in the following scale unless the penalty shall be sooner paid.” For these reasons I do not think that the decision in *M’Erlean’s Case* (1) has any application.

K. B. Div.
1913.
—
REX
(GRANT)
v.
JUSTICES OF
LOUTH.
—
Palles, C.B.

I do not think that we ought to give costs against the prosecutor here. We cannot, however, accede to the application to give him costs. It has been held that under the Judicature Act there is no jurisdiction to give costs to an unsuccessful plaintiff, or person in the position of a plaintiff, unless the case comes within some of the express provisions of the Act giving such jurisdiction.

I am of opinion therefore that we ought to refuse the motion without costs.

GIBSON and BOYD, JJ., concurred.

Solicitor for the prosecutor: *Francis P. Johnston.*

Solicitor for the Urban District Council of Dundalk: *James McCourt.*

J. G. T.

(1) 2 New Ir. Jur. Rep. 256.

K. B. Div. 1914.
Feb. 4, 5,
25. COUNTY COUNCIL OF DOWN, APPELLANTS ; IRISH
INSURANCE COMMISSIONERS, RESPONDENTS (ANNET'S
CASE).

SAME, APPELLANTS ; SAME, RESPONDENTS (M'CONNELL'S
CASE).

IRISH INSURANCE COMMISSIONERS, APPELLANTS ;
COUNTY COUNCIL OF DOWN, RESPONDENTS (O'NEILL'S
CASE).

SAME, APPELLANTS ; SAME, RESPONDENTS (M'CARTAN'S
CASE) (1).

*National Insurance—Local Government—County Council—Repair of roads
entrusted to contractor—Labourer appointed by county surveyor, paid by
and bound to obey orders of contractor as well as those of surveyor—
“Contract of service”—Employer—National Insurance Act, 1911
(1 & 2 Geo. 5, c. 55), s. 1, sub-s. 1, 2 ; Schedule 1, Part 1 (a).*

A county council entrusted the repair of certain roads to a contractor. The terms of the contract provided that the contractor should “keep” a surface-man, and pay him at a rate of wages prescribed by the county council ; that the surface-labourers “will be appointed by the county surveyor, and may be dismissed by him at any time on just complaint from the contractor, or for other causes.” According to the “instructions for surface-labourers,” embodied in the contract, the surface-men were bound to attend closely to the orders of the assistant-surveyor, and to those of the contractor when the assistant had not given any particular instructions. The Irish Insurance Commissioners issued a summons against the county council, as employers of the surface-men, for failure to pay the contributions under the National Insurance Act, in respect of the surface-men.

Held, that the contract of service was between the contractor and the surface-men, and that accordingly the contractor, and not the county council, was liable for payment of the contributions.

Held, also, that where a county council enter into a contract for the repair of roads, they cannot legally reserve for the county surveyor, or for a person employed by him, the performance of part of that repair.

(1) Before PALLES, C.B., and GIBSON and MADDEN, JJ.

These were cases stated by the justices of county Down.

K. B. Div.
1914.

ANNET'S CASE.

CO. COUNCIL
OF DOWN,
Appellants;
IRISH
INSURANCE
COMMES.,
Respondents.

At Downpatrick Petty Sessions held on the 1st January, 1914, the Irish Insurance Commissioners were complainants in a summons which charged the defendants, the County Council of Down, that the defendants being the employers of one John Annet, an employed contributor within the meaning of the National Insurance Acts, 1911 to 1913, did on March 1st, 1913, fail to pay a contribution of 5½*d.* which they were liable to pay under said Acts in respect of the said John Annet, for the week commencing February 24th, 1913.

The facts admitted or proved were as follows :—

John Annet had worked as a surface-man on the shore road at Kilkeel, county Down, for the past twenty-four years. During that period there had been changes of contractors, but Annet had worked on the road without intermission, and was working there during the week commencing February 24th, 1913, when a Mr. Joseph Doran was the contractor. Mr. Doran paid Annet his wages weekly at the rate of 2*s.* 2*d.* a day, and the workman's insurance card was unstamped for the week commencing February 24th, 1913.

The tender sent by Doran to the rural district council of Kilkeel to keep the road mentioned in repair was accepted by the county council on November 16th, 1909. The contract was for three years from the 1st April, 1910, at the rate of £106 5*s.* per annum. The contractor undertook to keep the county council indemnified against all damages and charges which they might incur or become liable to pay by reason of "the negligence of myself, or my servants, workmen, or agents" in the execution of the work. Clause 14 of the specification, incorporated in the contract, was as follows :—"The contractor will be responsible for the prompt execution of all labour on the road. Where regular surface-men are specified, the contractor must supervise the work, and whenever carting or additional labour is required, supply it without delay. The surface-labourers are to do surface-work only, and are not to break stones . . . The surface-labourers will be

K. B. Div. appointed by the county surveyor, and may be dismissed by him
 1914. at any time, on just complaint from the contractor, or for other
Co. Council causes. They are to be employed on the road during the ordinary
of Down, working hours of the days specified, and are to follow closely the
Appellants; directions of the assistant-surveyor and the printed instructions
Irish for surface-men. The contractor shall pay the surface-men weekly
Insurance at the specified rates." By this specification the contractor was
Comms., bound to "keep" one labourer six days in each week for twelve
Respondents. months in each year at 2s. 2d. wages per day.

Clause 1 of "Instructions for surface-labourers" stated "you are allowed by the county, wages at the rate 2s. 2d. per day, which the contractor is required to pay you weekly. You must work honestly on the road, and must never be absent without the permission of the assistant-surveyor." By clause 2 the contractor was bound to supply all tools. Clause 7 was in the following terms:—"You are to attend closely to the orders of the assistant-surveyor, and to those of the contractor, when the assistant has not given any particular instructions. The contractor is responsible for your punctual attendance, and for the proper discharge of your duties, and you must obey all his reasonable orders, treat him with respect, and work honestly for him."

It was maintained for the defence that the contractor who paid the surface-man was actually his employer; but the justices considered that as the sole right of engagement and dismissal and chief superintendence was vested in the county surveyor on behalf of the county council, the latter were Annet's employers, and they accordingly convicted the defendants, and imposed a fine of one shilling with ten shillings costs, and ordered the payment of the insurance for Annet. The opinion of the Court was sought as to whether they were right in law in so doing.

M'CONNELL'S CASE.

In this case the contract was entered into on December 12th, 1912, after the Insurance Act had come into operation. Clause 13 of the specification was identical with clause 14 in the first case, subject to the exception that in the last paragraph it specified the hours during which the surface-men were to work. Clause 35 was

as follows :—"The county surveyor shall have full power to dismiss any person employed by the contractor who shall, in his opinion, misconduct himself, or be incompetent or negligent in the performance of his duty, and the contractor shall, without delay, put another man in his place to the satisfaction of the county surveyor." The justices convicted in this case also.

K. B. Div.
1914.
Co. COUNCIL
OF DOWN,
Appellants ;
IRISH
INSURANCE
COMMES.,
Respondents.

O'NEILL'S CASE.

In this case clause 14 of the specification provided that "any surface-man must be dismissed by the contractor at any time on the complaint of the county surveyor. The surface-men are to be employed on the road during the working hours of the days specified, and are to follow closely the printed instructions for surface-men. Surface-men are not to be dismissed without the consent in writing of the county surveyor; the contractor must notify the name of each surface-man to the surveyor at the time of appointing him, and, on any change, must apprise the surveyor of the name of the new surface-man." The justices took the view that the contractor had the sole right of appointment and dismissal, and dismissed the complaint.

M'CARTAN'S CASE.

In this case clause 35 of the specification provided that "the county surveyor shall have full power to dismiss any person employed by the contractor who shall, in his opinion, misconduct himself, or be incompetent or negligent in the performance of his duty, and the contractor shall, without delay, put another man in his place to the satisfaction of the county surveyor." In this case also the justices dismissed the complaint.

Andrews (with him *D. M. Wilson, K.C.*), for the county council :—

We submit that *Annet* was entirely under the control of *Doran*, the contractor, and that this case is distinguishable from *Down County Council v. Irish Insurance Commissioners* (1), because in that

(1) See note, *post*, p. 120.

K. B. Div. case the men were employed under a scheme of direct labour. In
 1914. order to make the county council liable it is essential to establish
Co. Council a contract of service between them and Annet; here the only
of Down, contract of service is one between Doran and Annet. Under the
Appellants; National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), sect. 69, sub-s. 2,
Irish and the National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), sect. 34,
Insurance sub-s. 3, an employer who has failed to pay any contributions in
Comms., respect of an "employed contributor" is liable to a penalty. Accord-
Respondents. ing to the Act of 1911, sect. 1, sub-s. 2, First Schedule, Part I (a),
 "employed contributors" include persons employed "under any
 contract of service." Sect. 4, sub-s. 2, provides that the employer
 shall, in the first instance, pay the entire contribution, and shall be
 entitled to recover from the contributor, by deduction from his
 wages, or otherwise, the amount paid by him on behalf of the
 contributor. Where a contribution paid by the employer on
 behalf of an employed contributor is not recoverable by means of
 deductions from wages—as in this case, assuming the county
 council to be the employers—it shall be recoverable summarily
 as a civil debt, provided proceedings for the purpose are instituted
 within three months: National Insurance Act, 1911, Third
 Schedule, Clause 4. Here the summons was issued after the lapse
 of three months, and, therefore, if the council are held liable for
 payment in the first instance, they cannot recover from Annet.
 Clause 6 of the third schedule enables the Insurance Commis-
 sioners to make regulations providing that in cases where employed
 contributors work under "the general control and management"
 of some person other than their immediate employer, such person
 shall be treated as the employer, and may be allowed to deduct the
 contributor's share of any contributions paid by him from any sums
 payable by him to the immediate employer. No regulations have
 been made under this clause.

Clause 14 of the specification merely gives a right of selection
 to the county council, while the indemnity clause makes it plain
 that this workman was the servant of the contractor. In addition,
 clause 7 of the "Instructions to surface-men" provides that these
 men must obey all the reasonable orders of the contractor. When
 a public body, or individuals, enter into a contract for the execution
 of works, the fact that they retain the power of superintending the

execution of the works, or of insisting on the removal, in certain *K. B. Div.*
 events, of workmen under the contractor, does not of itself make *1914.*
 these workmen the servants of the body or individuals for whom *Co. Council*
 the contract is being executed: *Reedie v. London and North-* *OF DOWN,*
Western Railway Co. (1); *Steel v. South-Eastern Railway Co.* (2); *Appellants;*
Hardaker v. Idle District Council (3). Clause 35 of the specifica- *IRISH*
 tion in *M'Connell's* case clearly illustrates the meaning of the *INSURANCE*
 contract in *Annet's* case. *Commrs.,*
Respondents.

The Right Hon. The Attorney-General (J. F. Moriarty, K.C.),
The Solicitor-General (J. Pim, K.C.), and R. J. Sheehy, for the
Insurance Commissioners:—

We submit that the contract in the *Down County Council v. Irish Insurance Commissioners* (4) is identical with that in the present case, and that the meaning of the contract in *Annet's* case is that the county council, regarding the surface-man as a skilled workman, so framed the documents as to secure the continuance of his services to them. The tests applied in ascertaining liability at common law for acts of negligence committed by servants are applicable in this case. In such cases four criteria have been laid down for the purpose of determining who is the employer of a servant, viz.—(1) By whom was the servant engaged? (2) Who paid him his wages? (3) Who could discharge him? (4) Whose orders was he bound to obey?: *Swainson v. The North-Eastern Railway Co.* (5), *per* Bramwell, L.J., at p. 375. In the present case all these four criteria exist; the last is the most important, and in the absence of the other three, or any of them, control has been regarded as the test. Here clause 14 of the specification, and clause 7 of the “instructions to surface-men,” are conclusive on the question of control. In all these cases the power of control given to the contractor is the power merely of a foreman. It was obviously the intention of the contracts that the effective power of controlling these surface-men should be vested in the county council, and that the function of the contractor, so far

(1), 4 Ex. 244.

(2), 16 C. B. 550.

(3) [1896] 1 Q. B. 335.

(4) See note, *post*, p. 120.

(5) 47 L. J. Exch. 372.

K. B. Div. as they were concerned, should be merely to supervise the work.
 1914. [They cited:—*Murray v. Curry* (1); *Turner v. The Great Eastern Railway Co.* (2); *Rourke v. The White Moss Colliery Co.* (3); *Jones v. Scullard* (4); *Perkins v. Stead* (5); *Waldock v. Winfield* (6); *Sadler v. Henlock* (7); *Ruth v. Surrey Commercial Docks* (8).]
 Co. COUNCIL OF DOWN, Appellants; IRISH INSURANCE COMRS., Respondents.

D. M. Wilson, K.C., in reply:—

The meaning of the contract in the first case is, that Annet is nominated by the county council to carry out a contract of service between himself and Doran. Assuming that a contract of service was entered into between the county council and Annet, it would be *ultra vires*. The county council not having previously formulated a scheme of direct labour, had no option, when the proposals of the rural district councils came before them in reference to these contracts, but to accept or reject them: Grand Jury (Ireland) Act, 1836, s. 38, as adapted by Adaptation of Irish Enactments Order, 1899, Article 38; Procedure of Councils Order, 1899, Articles 22 and 25*a*. If, on the true construction of a statute creating a corporation, it appears to be the intention of the Legislature, expressed or implied, that the corporation shall not enter into a particular contract, every Court, whether of law or equity, is bound to treat a contract entered into contrary to the enactment as illegal and void, and incapable of being ratified: *Leake on Contracts*, 6th ed., pp. 419, 420. If the county council had entered into a contract of service between themselves and Annet, and that was declared to be *ultra vires*, the decision would not vitiate the entire contract between the council and Doran: *Wenlock v. River Dee Co.* (9).

To ask that this case should be decided according to the tests laid down in negligence cases is to ask to have it decided on a false analogy. In the negligence cases there are usually two masters, and the question that commonly arises is: In whose employment was the servant at the time of the doing of the particular negligent

- (1) L. R. 6 C. P. 24.
- (2) 33 L. T. (N. S.), 431.
- (3) 2 C. P. Div. 205.
- (4) [1898] 2 Q. B. 565.
- (5) 23 T. L. R. 433.

- (6) [1901] 2 K. B. 596.
- (7) 4 E. & B. 570.
- (8) 8 T. L. R. 116.
- (9) 10 Ap. Ca. 354.

act complained of? Here, the contractor is the person who must necessarily have control of the surface-man, from hour to hour and from day to day. The contractor merely surrendered portion of his rights to the county council; and the true construction of clause 14 is that the county surveyor, on behalf of the county council, was given a concurrent power of dismissal of the man whom he had appointed to do the work for Doran under his contract. In *Cameron v. Nystrom* (1) an action was brought by a seaman to recover damages for injuries sustained through the negligence of the foreman of the stevedores employed to unload the ship, and it was held that there was present every element necessary to establish that the foreman was the servant of the stevedores and not of the shipowners. The foreman was employed and paid by the stevedores, who were themselves paid a lump sum for discharging the vessel. In this case also there is present every element necessary to establish that Annet was the servant of the contractor. The latter was paid a lump sum to execute work under his contract, and out of that lump sum he was to pay any servants employed in the doing of the work. If, while acting under the directions of the county surveyor, the surface-man was guilty of negligence which injured a third party, the county council might be liable for damages, not on the ground that there was a contract of service between them and Annet, but on the principle *qui facit per alium facit per se*.

The Solicitor-General in reply cited *In re Waterford Road* (2); *Brown v. Butterly Coal Co.* (3).

Cur. adv. vult.

PALLES, C.B.:—

Feb. 25.

The question here is, were the defendants the employers, within the meaning of the National Insurance Act, of one John Annet.

Annet worked, as what is called in the documents a surface-labourer, in keeping in repair the surface of part of a road in the defendants' county, between Kilkeel and the sea, in respect of the repair of which there was a written contract between the defendants and one Joseph Doran.

(1) [1893] A. C. 308.

(3) 53 L. T. 964.

(2) 5 Ir. Jur. (N. S.), 220.

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OF DOWNS,
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COMMISSIONERS,
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The defendants insist that the contract with Annet was made by Doran, and not by them.

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Appellants ;
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In the proceedings before the justices the written contract between the defendants and Doran was given in evidence. It was contained in three documents—(1) a tender signed by Doran, and accepted by the defendants; (2) a printed specification referred to in the tender; and (3) a document referred to in the specification headed “Instructions for surface-labourers.” Of these three documents, the only one of which there is evidence that Annet was aware is the “Instructions for surface-labourers.” The last clause in it, No. 8, is, “You,” meaning Annet, “are at all times to carry a copy of these instructions, and show them to any person who may ask to see them.” The document is signed “James Heron, county surveyor.”

The question turns upon the nature of the contract upon the part of Annet which we ought to infer from the fact that he worked upon the road under this latter document.

It shows, in the first place, that there was a contract between the county council and Doran, within the meaning of the Grand Jury Acts, for the repair of this road.

Now, by the 22nd Article of the Procedure of Councils Order, all public works are to be executed by contract, except where, under any Act or Order, works are given into the charge of, or can be executed by, the county surveyor. There is no Act or order under which, when there is as here an existing contract for the repair of the road, the county council can reserve for the county surveyor, or for a person employed by him, the performance of part of that repair; and, therefore, if from the words of this document we infer a second contract, *i.e.* one between the county council and Annet, we infer an illegal and void contract, and one, consequently, the obligations arising under which could not be enforced by the county council.

The real question, therefore, is whether the contract we should infer is a sub-contract between Doran and Annet, which would be perfectly legal, or the illegal contract between the county council and Annet which has been found by the justices. The first matter of importance that strikes one in reference to this is that the stipulated wages, 2s. 2d. per day, are to be paid

weekly to Annet by the contractor; and the second is that Annet is to obey the contractor's reasonable orders, to treat him with respect, and work honestly *for him*; and, further, the contractor is responsible for Annet's punctual attendance, and for the proper discharge of Annet's duties. All this points to the conclusion that there was some contract between Doran and Annet, and the structure of the document, called the "Instructions," seems more of the character of instructions addressed to the servant or sub-contractor of another, than of instructions to one's own servant.

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Upon the other hand, it is rightly pointed out in support of the justices' decision that the wages, although to be paid by Doran, are "allowed by the county"; but this would be consistent with Annet's contract being either direct with Doran or with the county. It is further relied on that Annet is to attend primarily to the orders of the assistant-surveyor, and only to those of Doran when the assistant had not given any particular instructions. All this is consistent with the contract between the county council and Doran containing provisions that the surface-men employed by him shall follow these instructions, and it is of course well settled that where a contract between A and B provides that workmen of B in performing work shall follow the directions of C, the engineer of A, that does not constitute the workmen the workmen of A. No doubt, in such a case, if the workman of B does an injurious act by the direction of C as A's agent, A will be liable to an action for such act; but such action is not founded upon the relation of employer and employee, or of master and servant, between A and the person doing the act, but upon the direction by C, as A's agent, to do the act—*qui facit per alium facit per se*: *Steel v. South-Eastern Railway Co.* (1); *Hardaker v. Idle District Council* (2). The only other circumstances in the case were that Annet had worked on the road for twenty-four years; that he was originally appointed by Mr. Mitchell, the then deputy surveyor; that during this period there had been changes of contractors, but Annet had worked on the road without intermission. The mere nomination by the county surveyor of the

(1) 16 C B. 550.

(2) [1896] 1 Q. B. 335.

K. B. Div. surface-man is quite consistent with his employment by the con-
 1914. tractors. I leave out of consideration the specification, as it is not
 Co. COUNCIL shown to have been within the knowledge of Annet at the time
 of DOWN, of his employment; and, on the whole, I am of opinion that there
 Appellants; was no evidence before the justices that Annet was employed by
 IRISH the county surveyor, and that they ought to have found that he
 INSURANCE was employed by Doran, and dismissed the complaint.
 COMMRS.,
 Respondents.
 Palles, C.B.

This case, of the four before us, is the strongest in favour of the complainant, and consequently rules the others. In result, then, the convictions in the present case, and in M'Connell's Case, will be reversed, and the dismisses in O'Neill's and M'Cartan's Case will be affirmed.

In the first two cases in which there were convictions, we think the question was a very difficult one, and very fit to be brought before the Court; and, reversing, as we do, the decision of the magistrates, we direct that each party abide their own costs. In the other two cases, in which Mr. Wilson's clients succeeded in the Court below, we think there was no ground for the appeal, and in these we give Mr. Wilson's clients their costs.

GIBSON and MADDEN, JJ., concurred.

Solicitor for Down County Council: *B. N. Johnson.*

Solicitor for the Insurance Commissioners: *J. F. Culhane.*

C. L.

NOTE.

KING'S BENCH DIVISION, June 24, 25; July 1, 1913.

Before PALLES, C.B., and DODD, J.

COUNTY COUNCIL OF DOWN, APPELLANTS; IRISH INSURANCE COMMISSIONERS, RESPONDENTS.

National Insurance—Local Government—County Council—Contract of service—Work given in charge of county surveyor—Contractor employed by county surveyor—Liability of County Council to pay contributions under National Insurance Act, 1911, in respect of workmen employed by contractor—National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 1, sub-ss. 1, 2; Sch. I, Part 1 (a).

A county council gave a road in charge to the county surveyor, who, instead of employing labourers himself, entered into a contract with B, by which B was to do the necessary work. The surface-labourers were to be

appointed by the county surveyor, and might be dismissed by him, and were to follow the directions of the assistant-surveyor, but were to be paid by B. K. B. Div.
1913.

Held, that the work having been given into the charge of the county surveyor, as representative of the county council, it must be taken that the work was in charge of the county council, and that they, by their representative, selected the surface-labourers, and that therefore the county council was liable for the contribution payable under the National Insurance Act, 1911, in respect of such labourers. Co. COUNCIL
OF DOWN,
Appellants;
IRISH
INSURANCE
COMMRs.,
Respondents.

CASE STATED BY JUSTICES.

At a petty sessions held for the petty sessions district of Downpatrick, county Down, on the 22nd May, 1913, the Irish Insurance Commissioners were complainants in a summons which charged the County Council of Down, as defendants, for that the defendants, being the employers of one Daniel Malone, an employed contributor within the meaning of the National Insurance Act, 1911, did fail to pay a contribution of 5½d., which, under the said Act and the regulations made thereunder, the said council were liable to pay in respect of the said Daniel Malone for the week commencing November 11th, 1912. The justices, on the hearing of the complaint, ordered the defendants to pay a fine of one penny with costs. At the request of the defendants they stated the present case, from which the following facts are taken:—

Daniel Malone was a surface-man working on the public roads, and since April, 1906, had worked as such on road No. 21 from Greencastle to Kilkeel in county Down. This road had generally been let out for repair on contract, but no contractor was got to take it for the year from the 1st April, 1912, to the 31st March, 1913. Accordingly, by resolution in December, 1911, the county council handed over the care of this road for the year beginning the 1st April, 1912, to Mr. Heron, the county surveyor for county Down, in accordance with Articles 22 and 24 of the Procedure of Councils Order, 1899. The county surveyor employed a man named Hugh Beck as his sub-contractor for the road in question, the work having been delegated by the council to the county surveyor. Beck's name did not appear on the council's pay sheet, but the county surveyor made a contract with Beck, dated the 30th March, 1912, to do the necessary work on the road. By the terms of this contract Beck was obliged to provide a labourer to work on the road three days a week for twelve months at 2s. 2d. a day wages. Beck was liable for this payment, which was, in fact, paid by him, and neither the county council nor the county surveyor made any such payment. One of the clauses of the contract was as follows:—
The contractor will be responsible for the prompt execution of all labour on the road. When regular surface-labourers are specified, the contractor must supervise their work, and whenever carting or additional labour is required, supply it without delay. The surface-labourers are to do surface-work only, and are not to break stones. While stones are being spread, the ordinary work

K. B. Div. of cleaning, sweeping, picking, and raking is never to be neglected, and when
 1913. such surface-work is required the surface-man can only point out to the con-
 Co. COUNCIL tractor where the patches are wanted. The surface-labourers will be appointed
 OF DOWN, by the county surveyor, and may be dismissed by him at any time on just
Appellants; complaint from the contractor, or for other causes. They are to be employed
 IRISH on the road during the ordinary working hours of the days specified, and are to
 INSURANCE follow closely the directions of the assistant-surveyor, and the printed instructions
 COMMES., for surface-men. The contractor shall pay the surface-men weekly at the
Respondents. specified rates.

It was proved that Daniel Malone worked on the road, No. 21, from the 1st April, 1912, for the first three days of each week, and on another road for the last three days of each week. That he had been appointed surface-man on road No. 21 on the 2nd April, 1906, and had been working on the road prior to the contract made between the county surveyor and Beck, and had remained on so working after Beck's contract with the county surveyor began on the 1st April, 1912. Malone's insurance card for that week, commencing the 11th November, 1912, was unstamped.

The justices found that the county council was the employer of Daniel Malone in the week commencing the 11th November, 1912, and so was responsible for the stamping of his insurance card. That when road 21 was handed over to the care of the county surveyor for the year beginning the 1st April, 1912, they believed that he, as an official in the employment of the council, was acting as their agent; he was directly responsible to the council for the upkeep of the road, and the contract he made with Beck did not relieve him of that responsibility. That according to the terms of the contract, and as was admitted by the county surveyor in his examination, Beck had no power either to engage or dismiss a surface-man without the county surveyor's approval. They therefore found that Malone was in the employment of the county council on the 11th November, 1912, through their agent, the county surveyor, and that the county council was responsible for the stamping of the insurance card. The opinion of the Court was sought as to whether the justices were right in point of law.

D. M. Wilson, K.C., and James Andrews, for the appellants.

The Attorney-General (Moriarty, K.C.) and R. J. Sheehy, for the respondents.

July 1.

PALLES, C. B. :—

The short question in this case is, when works are put in charge of the county surveyor under the provisions of the orders under the Local Government Act, and the county surveyor gets persons to perform the duty imposed on him, whether the employers of those persons are the county council, or some intermediary who may have been employed under some contract, or quasi-contract, by the county surveyor.

The contract entered into in this case with the intermediary was in the

form of the ordinary contract usually entered into with a road contractor *K. B. Div.* when a contract has been regularly made between the county council and the 1913. road contractor; and as anything that we should have to say in relation *CO. COUNCIL OF DOWN, Appellants; IRISH INSURANCE COMMS., Respondents.* to what turns on the provisions of that contract would necessarily be applicable to cases where there were contracts under the former Grand Jury Acts, now under the Local Government Act, we think it would not be convenient in the present case that we should say anything as regards a case not before us, that is, a case of an ordinary contract entered into in pursuance of the provisions of the statute in a form which, as in the present, reserves a dominant control to the county surveyor. The argument of the Attorney-General might possibly be pushed to this, that such contracts may make the county council the employers of the labourers. I by no means say that this is not so. All I say is that we do not think it necessary to enter into the consideration of that question in the present case, because here there was no contract entered into by the county council, and what we have to deal with is a case of work given in charge to the county surveyor.

It appears to me to be clear that in such a case the county council must be deemed to be the employers, and that the decision of the magistrates was right.

These orders under the Local Government Act have the force of an Act of Parliament, and it is essential in the interests of the public that their provisions should be strictly adhered to. The Local Government (Procedure of Councils) Order, 1899, provides by Art. 22, that "all public works executed in pursuance of a proposal of the rural district council or proposal committee approved under this Order by the county council shall be executed by contract, except in cases where under the provisions of any Act or this Order works are given into the charge of, or can be executed by, the county surveyor. Provided that it shall be lawful for the county council, if they see fit, to arrange by contract for the repair of court-houses, sessions-houses, piers and quays, bridges, culverts, guard-walls, sign-posts, and mile-stones."

There are a number of provisions in the order for the purpose of securing that the contract shall be entered into at the lowest possible rate, and that the selection of the contractor shall be free from all jobbery.

It is sufficient, however, to say that no contract under that Article 22 was entered into in the present case.

Then Article 25A provides:—"Notwithstanding anything in this order relating to the execution of public works by contract, the county council of any county may, if they think fit, after consideration of the report to be made by the county surveyor with reference to each rural district in the county in the prescribed form and containing the particulars set out in the schedule to this order, make a general declaration specifying the roads in any one or more of such districts which have been selected by them as suitable to be maintained by direct labour under the charge of the county surveyor, and upon making such declaration the council shall formulate a scheme for carrying the same into effect."

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OF DOWD,
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Palles, C.B.

There is a subsequent order of the 5th April, 1902, which recites Article 25A, and states that it was duly confirmed by Parliament, and goes on to make provisions in reference to this scheme of direct labour. Clause 2 provides:—

“ When the council of any county at any quarterly meeting make, upon the report of the county surveyor, a provisional general declaration specifying the roads in any one or more rural districts in the county selected by them as suitable to be maintained by direct labour under the charge of the county surveyor, and formulate a scheme for carrying the same into effect, the secretary of the council shall, within seven days of the day on which such provisional declaration and scheme are made, send a copy of such declaration and scheme to the Local Government Board ” . . .

We have nothing before us in the nature of a scheme, so we have to give judgment on the net question: When works are not executed under contracts entered into in pursuance of the quasi-statutable provisions, but are given into the charge of the county surveyor, who is the employer of the persons who actually do the work?

Now, in the first place, the work is given into the charge of the county surveyor as the agent and representative of the county council. That follows from the decision in *Campbell v. Tate* (1), where it was held that the county surveyor was not liable for the negligence of the persons who actually did the work. Therefore it must be taken that the work was given into the charge of the county council, and that they, by their representative, selected persons for the purpose of doing that work. In my opinion, that makes the county council the responsible persons under the National Insurance Act.

Whatever be the form in which the transaction is worked out, the provisions of the Act of Parliament must govern. They make the surface-men in such a case as the present the direct servants of the county council.

On this ground we affirm the decision of the magistrates, leaving the question to be decided hereafter, if it should arise, as to what is the effect of the able argument of the Attorney-General in a case in which there is a statutable contract, which contract reserves such a right of control to the county council as in ordinary circumstances would render them liable to an action.

We do not think the case one for costs.

Dodd, J., concurred.

Solicitor for the appellants: *B. N. Johnson*.

Solicitor for the respondents: *J. F. Culhane*.

J. G. T.

LORD TALBOT DE MALAHIDE, APPELLANT; DUNNE, *K. B. Div.*
 RESPONDENT (1). 1914.

Jan. 22, 23.

*Justices—Jurisdiction—Bona fide claim of right—Seashore—Removal of
 sand—Prohibition by Board of Trade—Right of owner—Harbours Act,
 1814 (54 Geo. 3, c. 159), ss. 14 and 28.*

Section 14 of the Harbours Act, 1814, as amended by s. 16 of the Harbours Transfer Act, 1862, provides that no person shall, without rendering himself liable to a penalty, take any shingle from the shore of any harbour from which the Board of Trade shall by order prohibit the taking of shingle; and s. 28 provides that nothing in the Act shall take away any right of property possessed by any person in the shores of a harbour.

The Board of Trade, in pursuance of the powers conferred on them by the Acts, issued an order prohibiting the taking or removing of any shingle or ballast from the shores or banks of the sea, between certain points at Malahide.

The appellant, owner in fee of the *locus in quo*, prosecuted the defendant, one of his agricultural tenants, for having, in contravention of the statute, removed ballast from the shores of the port of Dublin, within the points indicated in the order of the Board of Trade. The defence set up by the respondent was, that as tenant he had always drawn gravel and sand off the foreshore, and that he enjoyed a right of property within the meaning of s. 28. The magistrates declined jurisdiction, on the ground that a bona fide question of title was involved.

Held, that the magistrates were right in declining jurisdiction.

Burton v. Hudson ([1909] 2 K. B. 564) followed.

Anderson v. Jacobs (93 L. T. 17) distinguished.

CASE STATED by justices under 20 & 21 Vict. c. 43. The case set out as follows:—

At the Swords Petty Sessions, held on the 22nd day of November, 1913, the complainant charged the defendant, who resided at Yellow Walls, Malahide, in the county of Dublin, that the defendant did on the 12th day of November, 1913, contrary to the statutes in that behalf, take ballast from the shores of the Port of Dublin, at a place between the viaduct of the Great

(1) Before PALLES, C.B., and GIBSON and DODD, JJ.

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K. B. Div. Northern Railway Company (Ireland) at Malahide on the west
 1914. — and a point about 500 yards north of the coastguard station at
 LORD TALBOT Robswalls on the east, being within the said port, from which the
 DE MALAHIDE Board of Trade, acting in pursuance of the Harbours Act, 1814,
v. as amended by the Harbours Transfer Act, 1862 (1), had by
 DUNNE. order under the hand of their secretary, dated the 20th day of
 June, 1913, and published in the *London Gazette*, dated the 24th
 day of June, 1913, prohibited the taking or removal of such
 ballast. The facts as proved or admitted were as follows:—

The Board of Trade, in pursuance of the powers conferred on them by the said statutes 54 Geo. 3, c. 159, s. 14, and 25 & 26 Vict. c. 69, s. 16, issued an order as follows:—

“Shores or banks of the sea at Malahide and Robswalls, county Dublin.

“Removal of materials prohibited.

(1) The Harbours Act, 1814 (54 Geo. 3, c. 159), sect. 14—“And in order to prevent damage being done to the shores or banks of the ports, harbours, or havens in this kingdom, be it further enacted, that no person or persons shall take any ballast or shingle from the shores or banks or any portion of the shores or banks of any port, harbour, or haven of this kingdom, from which the Commissioners for executing the office of Lord High Admiral of the United Kingdom for the time being shall find it necessary for the protection of such port, harbour, or haven, or the works thereof, by order under their hands or the hands of any three of them, or the hands of his or their secretary, and published, in the *London Gazette*, shall [*sic*] prohibit the taking or removing of such shingle or ballast, upon pain of forfeiting for every such offence the penalty of ten pounds.”

Section 28—“Provided always, and be it further enacted, that nothing in this Act contained shall extend or be construed to extend to prejudice, to diminish, abridge, alter, or take away any right of property, privilege, or jurisdiction, or any power of conservancy, held, possessed, used, exercised or enjoyed by any body corporate or politic, or by the lord or lords, lady or ladies of any manor or manors, or any person or persons whatsoever, in, to, upon, or over any of the ports, harbours, creeks, roads, bays, or navigable rivers of the United Kingdom, or to the banks, shores, or sides thereof . . . but that such respective rights of property, privileges, jurisdictions, and powers of conservancy shall be respectively and exclusively enjoyed in as full, ample, and beneficial a manner in every respect to all intents and purposes as if this Act had never been made, anything herein contained to the contrary notwithstanding.”

By section 16 of the Harbours Transfer Act, 1862 (25 & 26 Vict. c. 69), the Board of Trade was substituted for the Commissioners of the Admiralty.

"Whereas the Board of Trade, acting in pursuance of the *K. B. Div.* Harbours Act, 1814, as amended by the Harbours Transfers Act, 1914, 1862, find it necessary for the protection of the Port of Dublin to prohibit the taking or removing of any shingle or ballast from the shores or banks of the sea at Malahide and Robswalls between the viaduct of the Great Northern Railway (Ireland) at Malahide on the west and a point about 500 yards north of the coastguard station at Robswalls on the east, being within the said port.

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DUNNE.

"Now, the Board of Trade do hereby by this order prohibit the taking or removing of any shingle or ballast from the shores or banks of the sea between the points above mentioned.

"G. S. BARNES,

"A Secretary to the Board of Trade.

"Dated the 20th day of June, 1913.

"NOTE—Any person removing shingle or ballast in contravention of this notice is liable on conviction to a penalty not exceeding £10."

This order was duly published in the *London Gazette*, dated the 24th of June, 1913, a copy of which was given in evidence for the complainant; also a copy of the *Dublin Gazette*, dated the 15th day of June, 1849, as evidence that the portion of shore or banks of the sea between the above-mentioned points were within the Port of Dublin. It was also proved that notices containing the said Board of Trade order had been erected in five places along the said shore, and that on the 12th day of November, 1913, the defendant took and removed two cartloads of ballast, namely, sand and gravel, from the shore or banks of the sea adjacent to the Malahide Golf Club, being a place between the viaduct of the Great Northern Railway (Ireland) at Malahide on the west and a point about 500 yards north of the coastguard station at Robswalls on the east.

Mr. Charles H. Dillon, the complainant's land agent, proved that he had been agent of Lord Talbot de Malahide for over twenty years, and that his father had been agent of the estate of Lord Talbot de Malahide before him, having been appointed in the year 1861; and that he (Mr. Charles H. Dillon) had assisted

K. B. Div. his father in the agency of the estate since 1861, and knew all the
1914. - circumstances of the estate for over fifty years. He further
LORD TALBOT DE MALAHIDE deposited that Lord Talbot de Malahide's predecessor in title had a
v. grant from the Crown made in the reign of Edward IV, granting
DUNNE. this foreshore to the then Lord Talbot de Malahide and his heirs;
that this grant was now at Malahide Castle; that for over fifty
years past sand and gravel in small quantities had been removed
continuously from this foreshore by the tenants, but till recently
this removal only averaged about one load per month, whereas
now some sixteen or seventeen loads are being taken daily, and
that in consequence four or five acres had been washed away; that
only in the past three years had any apparent damage been done,
and that this so-called right was as much exercised by the public
generally as by the tenants; he alleged that no tenant had any
such right so to remove sand, gravel, or ballast from this foreshore,
and that sand and minerals were specifically reserved to the land-
lord in the leases, and that he had often warned the defendant to
desist from removing sand or gravel from this foreshore. In
cross-examination he deposed that the tenants on the estate had to
his knowledge continuously, for the past fifty years, so drawn sand
and gravel, but always, till recently, in small or inappreciable
quantities.

For the defendant two witnesses were examined.

Joseph Farrell deposed that he was a tenant of an agricultural holding on Lord Talbot de Malahide's estate since his father's death, four years previously; that his father had drawn sand and gravel from this foreshore for over fifty years previous to his death and during his tenancy, and that he had similarly drawn sand and gravel for his father and himself for the past twenty-four years. He had seen James Dunne and other tenants drawing sand and gravel; tenants for sixty-two years past had drawn from this foreshore.

James Dunne, defendant's father, deposed that he was a tenant of an agricultural holding on Lord Talbot de Malahide's estate since his father's death ten or twelve years previously; that his father was tenant before him and had always drawn sand and gravel off this foreshore; that he himself had similarly drawn same for the past thirty-five years, and that he and his father always believed

they had a right to do so as tenants; that about twenty-seven years ago Lord Talbot de Malahide tried to stop him and said the foreshore was private property.

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Counsel for the complainant contended that the order of the Board of Trade was binding on every member of the public, and that upon the evidence the jurisdiction of the justices was not ousted, as no bona fide question of title had been proved, and that the justices were bound to convict.

The solicitor for defendant contended that a bona fide question of title had been proved, and the jurisdiction of the justices ousted, and that defendant in doing the acts complained of in the summons exercised his undoubted right, as a tenant of Lord Talbot de Malahide, and because it was a right appurtenant to his holding.

The magistrates by a majority (Mr. Shannon, Resident Magistrate, dissenting) held that there was a bona fide question of title, and they accordingly declined jurisdiction.

The opinion of the Court was sought as to whether they were right in law in declining jurisdiction to deal with and determine the said complaint.

Brunskill (with him *Serjeant Matheson, K.C.*), for the appellant :—

The removal of shingle or sand from the shores or banks, even by the owner of the foreshore, is an illegal act, once the Board of Trade have issued an order under sect. 14 of the Harbours Act, 1814, and an illegal act cannot be justified under sect. 28 of the Act : *Anderson v. Jacobs* (1). The judgment of Lord Alverstone in that case is inconsistent with the judgment delivered by him four years subsequently in *Burton v. Hudson* (2). We submit that his judgment in the former case rules this case, and that sect. 28 is repugnant to sect. 14. The owner of the foreshore can be restrained, at the suit of the Crown, from removing shingle therefrom : *Attorney-General v. Tomline* (3).

(1) 93 L. T. 17.

(3) 12 Ch. Div. 214.

(2) [1909] 2 K. B. 564.

K. B. Div. *Joseph O'Connor, and James O'Connor, K.C., for the defen-*
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Some meaning must be given to sect. 28 ; and we submit that its effect is to cut down sect. 14, and to prevent its application where any person with a right or privilege to take sand is prosecuted under the Act. Under sect. 14 the removal of shingle from "shores or banks" is forbidden where the Board of Trade have issued a prohibition to that effect ; but under sect. 28 the rights of owners to banks or shores, and, therefore the rights of persons deriving through the owners, are preserved, and may be as fully enjoyed as if the Act had never been passed : *Burton v. Hudson* (1) governs this case. *Arnold v. Morgan* (2) is also an authority in our favour.

Serjeant Matheson in reply :—

The question which the magistrates had to determine was purely a question of law ; namely, a question on the construction of the statute. Section 14 imposes a prohibition upon the removal of sand or shingle from the area defined in the order of the Board of Trade, and Lord Talbot de Malahide himself could not with impunity have committed the offence created by sect. 14. We ask the Court not to follow *Burton v. Hudson* (1) on the grounds that it is not good law, that it is inconsistent with the decision of Lord Alverstone in the previous case, and that it nullifies section 14.

PALLES, C.B. :—

This case raises a point which is new in this country, but in reference to which we have an English decision which seems to be in point.

Proceedings before the magistrates were taken under the 14th section of the Harbours Act, 1814, by which the defendant was charged with taking shingle from the shores or banks of the sea at Malahide, within the port of Dublin. Evidence was given upon which, apart from sect. 28 of the Act, the magistrates might have found that the defendant was guilty of the act complained of. It

(1) [1909] 2 K. B. 564.

(2) 103 L. T. R. 763.

appeared in the course of the proceedings that Lord Talbot de Malahide was owner in fee of the *locus in quo*; that the defendant was his tenant, and that under the terms of his lease he (the defendant) was entitled to take sand from this part of the shore or bank; and upon these facts his solicitor submitted that he had a claim or title to real property which ousted the jurisdiction of the magistrates. The magistrates assented to that view; and, holding that the claim was a bona fide one, they dismissed the case upon that ground; and the question now is whether they were, or were not, entitled to do so.

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During the argument, especially during Serjeant Matheson's reply, the case was rightly treated as if the defendant were Lord Talbot de Malahide himself, and that he had done the act complained of. The question thus raised was whether he could have been convicted in these proceedings. In my opinion, that is the proper way of treating the case.

The provision of the law which prevents magistrates from proceeding to determine cases which apparently are within their jurisdiction, when a question as to the title to real property arises, is not contained in any statute. From the earliest times it was determined that they had no such right, not by reason of any express exception being contained in the statutes giving them jurisdiction, but upon the ground that when justices were constituted for the purpose of hearing complaints it was not intended that they should enter into complicated questions arising in respect of real property. The rule is well stated by Blackburn, J., in *R. v. Stimpson* (1):—
“The general rule of law applicable to justices exercising summary jurisdiction is that they are not to convict where a real question as to the right of property is raised between the parties; then their jurisdiction ceases, and the question of right must be settled by a higher tribunal, for the justices would be settling a question of title, conclusively and without remedy, if their decision happened to be wrong.”

In stating the rule in that way, no distinction appears, till a rather late period in the history of the question, to have been taken between questions of title dependent upon disputed facts and questions of title dependent upon disputed

(1) 4 B. & S., p. 309.

K. B. Div. law; but in modern times it was settled that where the right
 1914. claimed by the defendant was one which was unknown to the
 LORD TALBOT law—which could not exist in law—for instance, the right of the
 DE MALAHIDE public to fish in a non-navigable river, their jurisdiction was not
 v. ousted; but that is the only limitation I can find in reference
 DUNNE. to the distinction between questions of fact and questions of law.
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Here a question of considerable difficulty arises upon the construction of the Harbours Act, 1814, viz., the effect upon the 14th of the 28th section, which provides that nothing in the Act shall take away any right of property or possession of any person in a harbour or the shores thereof. It may be contended upon the one hand, as it was contended in one of the cases before Lord Alverstone, *Anderson v. Jacobs* (1), that the effect of section 28 is to prevent the owner of the foreshore from being prosecuted at all. It may, on the other hand, be contended, as it was argued by the Attorney-General in the other case before Lord Alverstone, *Burton v. Hudson* (2), that its effect would be, if the contention on the other side was admitted, to extinguish altogether the public right given by section 14; and that consequently that contention must be subject to some limitation. That is a question which, when it was brought before the King's Bench Division in England in 1909, the Court declined to decide in a case in which the question was, as here, whether the justices were right in declining jurisdiction. I say nothing more in reference to it than that the question is a difficult one.

When upon the facts a difficult question of law arises, are we to say that the magistrates were wrong in following the decision of Lord Alverstone? Having regard to the fact that the King's Bench in England, expressly declining to decide this question upon the Act of 1814, still held that the magistrates were right in holding that a question of title was involved, I think we should be taking a strong step if, differing from that decision, we forced the magistrates to proceed. Therefore all that is necessary to show is that the King's Bench in England did, in the case in 1909, decline to decide this question. Lord Alverstone says, at page 570 :—"The respondent says he has a conveyance

(1) 93 L. T. R. 17.

(2) [1909] 2 K. B. 564.

made in 1873 by the Crown to him of the Crown rights in that part of the foreshore. In these circumstances it seems to me that, in order to allow this appeal, we should have to say that a claim of this sort cannot be bona fide set up, on the ground that the Act of 1814 has by sect. 14 absolutely prohibited the owners of any foreshore, or of any Crown rights in the foreshore, from digging or removing shingle if the Board of Trade forbids them to do so." That is what we are asked to do here. "That raises" (continues Lord Alverstone) "a very important and a very difficult question of law. I express no opinion as to whether the respondent's contention is right or wrong, but I am satisfied that it is impossible to say that it is not, and cannot be, a bona fide claim of right. It is not suggested that the respondent's claim is not, in fact, made bona fide." And he adds later on—"In my opinion, if we were to hold that the jurisdiction of the justices was not ousted in this case, we should be departing from the recognized principle which has been acted on for years in this Court, as was laid down by Blackburn, J., in one case" (1), that is to say, Lord Alverstone decides that when the question is one of law arising upon the construction of an Act of Parliament the rule applies.

Grantham, J., says:—"We have to consider this question under the well-known principle of law that where property or title is in question the jurisdiction of the magistrate is ousted, the reason being that it is thought that a matter of so much importance should not be decided by magistrates at petty sessions, or by any Court of summary jurisdiction." That seems to me to be a distinct decision that where a question of title to real property depends upon a question of law, the justices ought not to proceed. Whether that be so or not, I think it would be too strong for us to decline to follow that decision; and, in reference to the previous decision of Lord Alverstone, it seems to me that the real point there was not the same as in *Burton v. Hudson* (2), because it was shown in *Anderson v. Jacobs* (3) that the act complained of was not done upon the foreshore. "The justices have found, as a matter of fact," says Lord Alverstone, "that the appellant had

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(1) *Reg. v. Stimpson* [1863] 4 B.
& S. at p. 309.

(2) [1909] 2 K. B. 564.

(3) 93 L. T. R. 17.

K. B. Div. dug and taken the shingle at these points below high-water mark.
 1914. *Prima facie*, therefore, an offence had been committed by the
 LORD TALBOT DE MALAHIDE appellant. Counsel for the appellant, however, ingeniously con-
v. tended that, as the spot from which the appellant took the shingle
 DUNNE. was formerly his, and that as he had a legal right to reclaim land
 Palles, C.B. which was formerly his, but of the use of which he had been
 deprived by the encroachment of the sea, he was entitled to take
 shingle from that land to be used for that purpose. Ingenious,
 however, as that argument is, it seems to be beside the mark.
 Whether or not the appellant could lawfully build a wall for the
 purpose of reclaiming his land at the places where he had dug the
 shingle, it is not necessary to decide in this case. My present
 impression is that he might be able to do so. That, however, is
 not the point which we have to decide in this case. It seems to me
 that, it having been proved that the appellant had committed the acts
 complained of, it is impossible to say that the fact that the shingle
 was used for the purpose alleged by the appellant prevented those
 acts from being an offence against the order of the Board of
 Trade."

In fact that is clearly a case to which the 28th section could not apply. Therefore I am of opinion that the magistrates were within their right, when they held that a bona fide claim to real property was raised, in refusing to proceed.

It is suggested that in arriving at this decision we render sect. 14 a dead letter. This is not so. The Crown can proceed by information in the High Court to have the question decided.

GIBSON and DODD, JJ., concurred.

Solicitors for the appellant: *A. & J. Robinson.*

Solicitor for the respondent: *L. J. O'Neill.*

C. L.

DERHAM AND ANOTHER v. DOYLE (1).

Appeal.
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Statute of Limitations—County Court—Civil bill ejectment on title—Estoppel Feb. 9, 21.
—Effect of unexecuted decree for possession—Civil Bill Courts (Ireland)
Act, 1851 (14 & 15 Vict. c. 57), ss. 76, 96, 139, 144—Real Property
Limitation Act, 1874 (37 & 38 Vict. c. 57), ss. 2, 3.

An unexecuted decree for possession obtained in a civil bill ejectment on the title is not a declaration of the plaintiff's title, nor does it give him a new title, or amount to an acknowledgment by the defendant of the plaintiff's title, or operate as an estoppel, so as to prevent the Statute of Limitations from running in favour of a defendant in actual occupation of the land.

APPEAL by plaintiffs from the decision of the King's Bench Division.

This was a case stated under the Civil Bill Courts Procedure Amendment Act (Ireland), 1864, by Molony, J.

The case set out as follows :—

"A civil bill in ejectment on the title was issued on the 3rd day of May, 1913, by the plaintiffs, claiming possession of 'all that and those the farm and lands of Knockdreet, situate in the parish of Newcastle Lower, barony of Newcastle, and county of Wicklow, together with the appurtenances thereunto belonging.' The said civil bill was heard before the County Court Judge of Wicklow on May 22, 1913, and he gave a decree for possession, with costs. The defendant appealed from this decree, and the hearing of said appeal came before me as Judge of Assize on June 30, 1913, at Wicklow. The following facts were admitted by counsel for the plaintiffs and defendant :—

"1. That up to the date of his death, which occurred upon January 19, 1900, the lands in question were in the possession and occupation of David Doyle, as judicial tenant. The said David Doyle was the father of the defendant.

(1) Before O'CONNOR, M.R., and HOLMES and CHERRY, L.JJ.

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"2. The said David Doyle made a will, dated January 19, 1900, by which he bequeathed the lands in dispute to his daughter, Bridget Doyle, who was then a married woman, and appointed her his sole executrix and residuary legatee. Administration with will annexed thereto was granted to John E. Lyons, Michael Derham, and Mary Doyle on January 6, 1904.

"3. The said Bridget Doyle never entered into possession of the said lands, and died on February 1, 1902, having previously made her will, by which she bequeathed the said lands to her daughter, Bridget Doyle, junior. On June 2, 1903, probate of the said will was granted to John E. Lyons, Michael Derham, and Bridget Doyle, the executors therein named, and the plaintiffs herein.

"4. The said Bridget Doyle, junior, was at the date of her mother's death a minor, and attained the age of twenty-one on December 15, 1902.

"5. The defendant is a son of the said David Doyle, and had been living with his father until the latter's death. He continued after the father's death in possession and full occupation of the said holding, and no claim was made by the said Bridget Doyle, senior, thereto, or by the said Bridget Doyle, junior, or the personal representatives of the said David Doyle or Bridget Doyle, senior, until the year 1911, when the defendant, having refused to deliver up possession, a civil bill in ejectment on title was issued by the plaintiffs against the defendant on December 29, 1911, and on the hearing of the same before the County Court Judge of Wicklow, both parties being represented, he gave a decree for possession on January 17, 1912. No steps were taken by the plaintiffs on foot of the said decree, and the defendant continued in possession of the said lands.

"6. A new civil bill in ejectment on title was brought on May 3, 1913, by the same plaintiffs against the same defendant, and on the hearing thereof by the County Court Judge of Wicklow on May 22, 1913, he gave a decree for possession, with costs, as above mentioned.

"7. On the hearing of the appeal before me, the plaintiffs' counsel contended:—(1) That the decree for possession, dated January 17, 1912, operates as an estoppel; (2) that the said decree

is in effect a declaration of title, and that in consequence the Statute of Limitations would only commence to run against the plaintiffs from the date of the said decree; (3) that the decree amounted to an acknowledgment of the plaintiffs' title within the meaning of the Statute of Limitations.

"8. The defendant's counsel contended that the defendant had acquired an indefeasible title under the Statute of Limitations, and that the decree was wholly inoperative, not having been executed, and no steps taken under it within one year from its date, or at all.

"9. I suspended my decision of the said appeal pending the judgment of the Divisional Court upon the above points.

"10. If the Divisional Court decides that the decree had any of the effects the plaintiffs contend, I affirm the decree of the County Court Judge, with costs below and costs of appeal.

"11. If the Divisional Court decides against the plaintiffs' contentions as to the effect of the said decree of January 17, 1912, I reverse the decree appealed from, with costs below and costs of appeal."

The King's Bench Division (Palles, C.B., Boyd and Kenny, JJ.) answered the questions involved in the case as follows:—

(1) That the decree for possession, dated the 17th January, 1912, does not operate as an estoppel; (2) that the said decree was not in effect a declaration of title which would prevent the Statute of Limitations from running against the plaintiff; (3) that the decree did not amount to an acknowledgment of the plaintiffs' title within the meaning of the Statute of Limitations.

Swayne, for the plaintiffs:—

[He referred to sects. 79, 96, 139, and 144 of 14 & 15 Vict. c. 57; sect. 1 of 37 & 38 Vict. c. 66; and sects. 2 and 3 of 3 & 4 Wm. 4, c. 27.] The decree for possession obtained by the plaintiffs on the civil bill ejectment of January 17th, 1912, gave them a new right: *Farren v. Beresford* (1); *Farrell v. Gleeson* (2);

(1) 10 Cl. & F. 319.

(2) 11 Cl. & F. 702.

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 not give them a new right which prevents the Statute of Limitations running, then if the decree were obtained one month before the statutory period expired, it would have to be executed within the month, though the Civil Bill Act provides that it may be executed within a year; that would be the result if the plaintiffs get no new title, because their old title would be gone. The decree is more than a mere piece of machinery for putting a plaintiff in possession, it gives him a right, viz., a new right of entry. The decree also operates as an estoppel, and is conclusive evidence of the plaintiffs' title at that date: *O'Donnell v. Ryan* (3); *Doyle v. Keenan* (4). *Lennon v. Meegan* (5), and *Musgrave v. M'Avey* (6) are distinguishable, being cases not of a decree, but of a dismiss. Before obtaining a decree for possession it is necessary that the plaintiff should satisfy the Court that he has a good title to the lands; and the granting of a decree amounts therefore to a declaration of the plaintiff's title. [He also referred to *Irish Land Commission v. Ryan* (7).]

Eforde, for the defendant:—

To prevent the Statute of Limitations from running, there must be an effective entry amounting to a divesting of the possession out of the wrongful holder and re-vesting it in fact in the rightful owner: 3 & 4 Wm. 4, c. 27, sect. 10; *Doe d., Baker v. Coombes* (8); *Randall v. Stevens* (9); *Worsam v. Vandenbrande* (10); Darby and Bosanquet on the Statute of Limitations, 2nd ed., p. 374; Lightwood on the Statute of Limitations, p. 100. The mere obtaining of a decree in ejectment is not such an entry. A judgment in ejectment, unless executed, does not give possession: *Thorp v. Facey* (11). The plaintiff has as much right to take possession, if he can get it peaceably, before the decree as afterwards. The real right is the right of entry, and the right of

(1) 7 A. C. 235.

(2) 24 L. R. Ir. 40.

(3) 7 Ir. Jur. (O. S.) 127.

(4) 9 L. R. Ir. 168.

(5) [1905] 2 I. R. 189.

(6) [1906] 2 I. R. 516.

(7) [1900] 2 I. R. 565.

(8) 9 C. B. 714.

(9) 2 E. & B. 641.

(10) 17 W. R. 53.

(11) 35 L. J. C. P. 349.

action is only given to enforce the right of entry: *Governors of Magdalen Hospital v. Knotts* (1), per Thesiger, L.J., delivering the judgment of the Court of Appeal. *Pugh v. Heath* (2) was a case of an order for foreclosure, and the decision was based on the ground that the effect of such order was to vest the ownership and beneficial title to the land *for the first time* in a person who had previously been a mere incumbrancer. As a decree in ejectment has no such effect, that decision is in my favour. *Irish Land Commission v. Junkin* (3) was a decision in respect of a rentcharge, and has no bearing on the present case.

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The decree is not an acknowledgment of the plaintiffs' title sufficient to prevent the statute running, since it is not signed by the person in possession; 3 & 4 Wm. 4, c. 27; *Goode v. Job* (4).

Nor is it a declaration of title. A plaintiff, even though entering under a judgment in ejectment, gets no better title than he had before: *Taylor d., Atkyns v. Horde* (5); moreover there is no jurisdiction in the Civil Bill Court to make a declaration of title: *Sullivan v. Orpen* (6).

A civil bill decree in ejectment does not operate by way of estoppel: *Lennon v. Meegan* (7); *Musgrave v. M' Avey* (8); *M' Sheffrey v. Doherty* (9); *Taylor d., Atkyns v. Horde* (5); *Doe d., Davis v. Evans* (10); *Doe d., Foster v. Earl of Derby* (11). But assuming that it can so operate, its only effect could be to preclude the defendant from denying that the plaintiff was entitled to possession of the lands *at the date of the decree*. This, however, is not disputed. The defendant's case is, that, although the plaintiff was not entitled to possession at the date of the decree, his title has since been extinguished by the Statute of Limitations.

Swayne, in reply.

Cur. adv. vult.

(1) 8 Ch. D. 709, at p. 727.

(2) 7 A. C. 235.

(3) 24 L. R. 1r. 40.

(4) 28 L. J. Q. B. 1.

(5) 1 Burr. 114.

(6) [1909] 1 I. R. 46, at p. 48.

(7) [1905] 2 I. R. 189.

(8) [1906] 2 I. R. 516.

(9) [1897] 2 I. R. at p. 216.

(10) 9 M. & W. 48.

(11) 1 A. & E. 783.

Appeal.
1914.

O'CONNOR, M.R.:—

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Feb. 21.

This is an appeal from the judgment of the King's Bench Division, deciding in effect that the plaintiffs are barred by the Statute of Limitations from recovering from the defendant certain lands, of which he is in possession.

On the 3rd of May, 1913, the plaintiffs issued a civil bill ejectment on the title against the defendant, claiming possession of a parcel of land situate in the county of Wicklow. This civil bill was tried by the County Court Judge of Wicklow on the 22nd May, 1913, and he gave a decree for possession. An appeal was taken to the Judge of Assize, Mr. Justice Molony, who stated a case for the decision of the Divisional Court. That Court, by their order dated the 25th November, 1913, so answered the questions submitted to them as to amount to a reversal of the decree for possession. The present appeal is from that order.

The legal point involved may be shortly stated. It is admitted that for more than twelve years before the issue of the civil bill ejectment the plaintiffs and their predecessors in title had not been in the possession of the lands; but it is contended on their behalf that they are not debarred by this lapse of time, because on the 29th December, 1911, they had issued a civil bill ejectment against the defendant for the recovery of the same lands, and got a decree for possession from the County Court Judge on the 17th January, 1912. This decree is now relied upon by the plaintiffs, although it was never executed, and can never be executed because the time for renewal thereof was allowed to run out—an omission which rendered necessary the new civil bill, which is the subject of the present proceeding. The only question for decision is whether the civil bill decree, dated the 17th January, 1912, in any way affected the defence under the Statute of Limitations, which was set up by the defendant.

I will first deal with the case on the assumption that a decree in an ejectment on the title in a Civil Bill Court has exactly the same legal effect as a judgment for the recovery of land on the title in a Superior Court.

It was argued by counsel for the plaintiffs that the decree gave a new starting-point, and that time should only be computed from its date. Now, if a decree or judgment in ejectment gave the plaintiff a title which he had not before, I would be prepared to accede to this proposition; but it is well settled that such is not the effect of a judgment in ejectment. It does nothing more than adjudge that the plaintiff is entitled to recover possession of the land. This judgment is executed by a writ of habere, and when a plaintiff is thereby put into possession, he holds the land by the same title which was vested in him before action brought. The judgment merely remits him to his original right: *Taylor d., Atkyns v. Horde* (1); *Cole on Ejectment*, p. 77.

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This being so, I do not see on what principle the doctrine of a new starting-point rests. Indeed, the decisions which the plaintiffs' counsel relied upon may be used in destruction of his argument. *Pugh v. Heath* (2) was an action for the recovery of the possession of lands. The plaintiffs had been legal mortgagees under a mortgage deed dated 24th November, 1856. The action was not commenced until 1887. In the meantime the plaintiffs were never in possession, and never received any principal or interest, or any acknowledgment of their title; but in the year 1870, the plaintiffs, who were then only mortgagees, had filed a bill against the owners of the equity of redemption for redemption or foreclosure; in 1874 a decree nisi for redemption or foreclosure was pronounced, and in 1877 an absolute order for foreclosure was made. It was held that although more than twenty years after the date of the mortgage deed had elapsed, the plaintiffs' title was not barred by the Statute of Limitations, because the right to bring the action must be taken to have accrued at the date of the foreclosure decree.

So, it is argued in the present case that the right to bring the civil bill ejectment accrued at the date of the previous civil bill decree. But a decree or judgment in ejectment is wholly different in character from a decree in foreclosure. The former merely adjudges that the plaintiff is entitled to possession; the latter gives the plaintiff a title which he had not before—that

(1) 1 Burr. 114.

(2) 7 A. C. 235.

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is, a title to the equity of redemption which in the eyes of a Court of Equity is an estate in the lands. It will be seen from a consideration of the judgments in the case referred to, that this was the reason for that decision. The judgment referred to in argument was that of Lord Cairns in the House of Lords, but the full statement of the law is to be found in the judgment of Lord Selborne in the Court of Appeal (6 Q.B.D. 345, 357), which was adopted by the House of Lords. The action was tried by Denman, J., who directed a verdict and judgment to be entered for the plaintiffs, on the ground that the foreclosure order prevented the Statute of Limitations from being a bar to the action. This judgment was reversed by the Divisional Court, consisting of Coleridge, C.J., and Lindley, J., who held that the foreclosure decree did not touch the question of possession; that it gave the plaintiffs no greater right to possession than they had before, and did not extend their time for the recovery of the land on foot of their legal title. The plaintiffs appealed to the Court of Appeal, and the judgment of the Court was that delivered by Lord Selborne, L.C. A perusal of that judgment shows that the reason for the decision is to be found in this characteristic of a foreclosure decree—that it gives to the mortgagee a new estate which he had not before, that is, a new title—in this respect differing from a judgment in ejectment. At p. 360 of the report in 6 Q.B.D., after showing that in equity a mortgagee has nothing more than a security for a debt, and that the mortgagor is considered to be the owner of the land, he goes on to say:—"This being the position of the title, as long as the mortgage is redeemable, the effect of an order of foreclosure absolute is to vest the ownership of, and the beneficial title to, the land, for the first time, in the person who previously was a mere incumbrancer. The equitable estate of the mortgagor is then forfeited and transferred to the mortgagee." Later on he says:—"It follows from this state of the law that when the owner of land under an ordinary decree of foreclosure absolute takes proceedings to recover possession of that land, he seeks possession of that which, by a title newly accrued, has for the first time become his property." Then, in a subsequent paragraph—"The present plaintiffs had, thirteen months before the commencement of this action, obtained

against the present defendant an order of foreclosure absolute, having that effect in equity which has been described. Their action was brought upon the title so obtained." On this statement of the law, it was held by the Court of Appeal, and subsequently by the House of Lords, that the action was not barred, and that time began to run only from the date of the foreclosure decree. It is manifest that this was because a new title accrued, whereas a judgment in ejectment leaves the plaintiff's title in exactly the same condition it was in before the commencement of the action. This distinction may be best illustrated by taking the case of a sale by a person as absolute owner who had been a mortgagee. His abstract of title would be incomplete if it only set out the mortgage deed. It would at once be met by the objection of the purchaser that *prima facie* there was an equity of redemption outstanding, and the vendor would be obliged to supplement his abstract by the addition of his foreclosure decree. Indeed a foreclosure decree is as much a muniment of title as a conveyance. On the other hand, a judgment in ejectment is no part of an owner's title. There is no necessity for setting it forth on an abstract of title, although no doubt, as an act of ownership, confirmed in public Court, it is strongly corroborative of a title to possession. I therefore think that *Pugh v. Heath* (1) is no authority for the appellants' argument, but, on the contrary, is an authority against it.

Two other decisions were cited: *Farren v. Beresford* (2); and *Farrell v. Gleeson* (3). Both were actions upon judgments which would have been barred by lapse of time were it not that writs of *scire facias* had been issued on foot of them. In the first case judgment was given for the defendant on a pleading point, the plaintiff having made a departure by relying on the *scire facias* in his replication to a plea of the Statute of Limitations; but Tindal, C.J., who gave the opinion of the Common Law Judges who were called in to advise the House of Lords, expressed the view that a *scire facias* would save a judgment from the plea of the statute, because a new right had been created. This view

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(1) 7 A. C. 235.

(3) 11 Cl. & F. 702.

(2) 10 Cl. & F. 319.

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was adopted by the House; and in the second case above mentioned, in which a bill was filed to enforce a judgment which had been revived by *scire facias*, and where the net question arose whether a plea of the statute should prevail in a case where a *scire facias* was issued within twenty years before action on a judgment entered up more than twenty years before action, Lord Cottenham, giving the judgment of the House, confirmed the opinion given by the judges in *Farren v. Beresford* (1), and held that a plea of the lapse of more than twenty years from the entry of the judgment before the filing of the bill was bad, inasmuch as it appeared that the judgment had, within the twenty years, been revived by *scire facias*, which gave a new right to the plaintiff. Lord Cottenham quoted the words of the Lord Chancellor in *Farren v. Beresford* (1)—“I agree with Her Majesty’s Judges in thinking that in this case a new right was acquired by the judgment on *scire facias*.”

These authorities therefore do not touch the present case, because, as I have already pointed out, a judgment in ejectment confers no new right. To my mind they are authorities against the plaintiffs’ contention, because they establish that a judgment does not give a new point of departure in the computation of a time limit under the statute, unless a new right is thereby created. A judgment in a personal action does give such new right, because the debt, whether it be a simple contract debt or a specialty debt, on which the action is brought, ceases to exist, and becomes a judgment debt—*transit in rem judicatam*. The judgment debt is a wholly different thing from the debt on which it was founded. It carries interest where no interest was payable before; it reduces interest to 4 per cent. where a larger rate was payable; and if the amount of the judgment is made up of principal and interest, the whole sum carries interest. The judgment *in personam* therefore gives an entirely new right, and in this respect is wholly different from a judgment in ejectment.

So far, I have dealt with the case as if a judgment in ejectment in the Superior Court and a civil bill decree in ejectment have the same legal effect. Counsel for the appellant contended

(1) 10 Cl. & F. 319.

that this is not so, on account of the special provisions of the 14 & 15 Vict. c. 57, which, as amended by the 37 & 38 Vict. c. 66 and 40 & 41 Vict. c. 56, gives jurisdiction to Civil Bill Courts in ejectment. The argument was that by sect. 133 of 14 & 15 Vict. c. 57 the decree is made "absolutely final to all intents and purposes," and thus made essentially different from a judgment in ejectment, which creates no estoppel. Even if this were so, I do not think that I could hold that a civil bill decree in ejectment on the title gives a new point from which time should be computed, because mere finality in the decree for possession is quite consistent with the continuance of the old right which had previously accrued. I need not, however, go into this question. I prefer to base my decision on the proposition that a decree in ejectment on the title in the Civil Bill Court has exactly the same legal effect as a judgment in ejectment in the Superior Court, and that the effect of sect. 133 of 14 & 15 Vict. c. 57 is, in the language of Monahan, C.J., in *Coneys v. Coneys* (1), "merely to render the decree final in the suit, and incapable of being reversed by any direct proceedings." This is the view of the law established by the judgment of the King's Bench Division in *Musgrave v. M'Arvey* (2), confirming the previous judgments in *Lennon v. Meegan* (3). Having read these judgments, and particularly the very full review of the law contained in the judgments of the Lord Chief Baron and Barton, J., in *Lennon v. Meegan* (3), I feel that I cannot usefully add anything to them; and I am satisfied with saying that I respectfully concur with these learned Judges.

In my opinion, the judgment of the Court below should be upheld, and the appeal refused with costs.

HOLMES, L.J.:—

The facts of this case are very simple. The civil bill ejectment in which the case was stated had been brought to recover lands in county Wicklow, of which David Doyle was judicial tenant at the time of his death in January, 1900, and which he bequeathed to a married daughter, Bridget Doyle. This daughter died early in

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(1) 8 I. C. L. R. 379.

(2) [1906] 2 I. R. 516.

(3) [1905] 2 I. R. 189.

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1902, having bequeathed the premises to her daughter, Bridget, a minor, who came of age in December, 1902. The wills of David and Bridget were duly proved, and the plaintiffs in these proceedings are the owners of David Doyle's judicial tenancy if it still continues to exist; but the question to be decided in this appeal is whether David Doyle's title has been barred by the Statute of Limitations.

At the time of his death, a son, James Doyle, was living with him, who continued in full occupation of the holding, and no claim was ever made by the personal representatives of David Doyle or of Bridget Doyle, senior, or by that lady herself, or by her daughter, Bridget, down to the year 1911, when, after demand of possession, the plaintiffs obtained a decree, dated the 17th January, 1912, in a civil bill ejectment in the title. No entry or other step was taken in pursuance thereof, and the defendant continued in possession, whereupon the plaintiffs, on the 3rd May last, brought against him another civil bill ejectment on the title in which a decree was given on the 22nd May. From this decree an appeal was taken, on the hearing of which the present case was stated by the Judge of Assize.

It is admitted that if there had been no decree of the 17th January, 1912, the plaintiffs' title would have been barred by the Statute of Limitations; but it is argued that this decree operates as an estoppel, or as a declaration of title, or as an acknowledgment of the plaintiffs' title within the meaning of the statute. When the fictions on which was based the old action of ejectment in the Superior Courts disappeared, there was much discussion as to whether a judgment in the new action of ejectment was, like other judgments, conclusive between the parties; but this was put an end to by our Common Law Procedure Act, 1856, sect. 94, which, in effect, enacts that it is not conclusive, and that the unsuccessful party may bring as many actions of ejectment as he may think fit, subject to the provisions of sect. 95 relating to his liability to give security for costs. If a civil bill decree of ejectment on the title is of the same character, the defendant ought to succeed, for in such case there would be no answer to the Statute of Limitations; but the plaintiffs' counsel contend that the decree of 1912 operates as an estoppel, and prevents the defendant from relying

on this defence. The question discussed in this Court by the opposing counsel has been whether the decree is conclusive or not—the plaintiffs contending that it is, the defendant that it is not. I am aware that there is considerable difference of opinion amongst lawyers, and even conflicting decisions, as to whether an ejectment civil bill decree has a greater efficiency than a judgment in an action of ejectment. The former is the creature of comparatively recent statutes, the language of which is far from clear. The lands sought to be recovered in the Civil Bill Court are of comparatively small value, and I would regret to be obliged to hold that a right to the possession of premises that had been decided at one Sessions could, without any change of circumstances, be re-agitated at the next.

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If it were necessary to decide this question, I should carefully consider it; but in my opinion the issue of this appeal does not depend on it. Assuming the decree of 1912 is an estoppel or conclusive, what does it conclude? Can it be anything more than that the plaintiffs were then entitled to possession of the premises? This is not denied, but no possession was taken; and unless I am prepared to hold that the mere issue of the decree amounts to the giving of a constructive possession of the lands to which it relates, it does not benefit the plaintiffs.

The Real Property Limitation Act, 1874, prohibits any person from making an entry on any land and bringing an action or suit to recover any land but within twelve years from a time which is admitted in this case to have been the 19th January, 1900. The first decree was within this period—therefore it was legal. But the second civil bill was brought after the period had elapsed, and therefore it ought to have been dismissed. Beyond the extent which I have suggested, and which I have assumed to be in favour of the plaintiff, although I am far from so deciding, there is nothing in the first decree amounting to a declaration of title, and certainly there is nothing amounting to an acknowledgment of the plaintiffs' title within the meaning of the Statute of Limitations. For these reasons I am of opinion that the appeal ought to be dismissed.

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Reference was made in Court to the case of *The Irish Land Commission v. Junkin* (1), in which it was held that a civil bill decree for arrears of tithe-rentcharge obtained within twelve years before the action, though unsatisfied, saves the tithe-rentcharge from being barred; but having re-read that case, I think it throws no light on the question now before us.

CHERRY, L.J. :—

An interesting question of law is raised in this case. The plaintiffs had obtained a decree for possession of certain lands in an ejectment on the title in the County Court. This decree was made less than twelve years from the date at which the plaintiffs' title had accrued, and could have been executed within twelve months of its recovery. The plaintiffs did not go into possession under the decree within the period of twelve months for which the decree was in force; but shortly after it had ceased to be effective they issued a new civil bill in ejectment for the same lands. This second action was not commenced within twelve years from the original accrual of their title, and the question for our decision is whether the action is barred by the Statute of Limitations or not. The plaintiffs contend that it is not, mainly on the ground that a new right to possession sprang up under the unexecuted decree, and that the period within which the action can be brought must now be calculated from the date of that decree.

In support of this contention two cases were mainly relied upon by Mr. Swayne in his able argument. The first was a case of *Irish Land Commission v. Junkin* (1), in which it was held that a civil bill decree for arrears of tithe-rentcharge, though unsatisfied, saves the tithe-rentcharge from being barred by the Statute of Limitations. But the wording of the statute with regard to rentcharges is quite different from that dealing with the recovery of land; and that case has no bearing upon the question now before us.

The second case relied upon by the plaintiffs was a much

stronger authority in their favour. It was a case of *Pugh v. Heath* (1), where it was held by the House of Lords that an absolute order for foreclosure, in a suit by a mortgagee, stopped the running of the Statute of Limitations, as against the mortgagee's right to possession. But the ground of that decision, both in the Court of Appeal and in the House of Lords, was that the decree for foreclosure absolute gave a new right, and conferred a new estate, on the mortgagee, and so gave in effect a new right of entry. Here it cannot for a moment be contended that a new estate or right of any kind was conferred by the civil bill decree upon the plaintiffs. Their right of entry was the same throughout, and their estate in the lands did not undergo any change by the decree. The case does not help the plaintiffs, therefore, any more than that of *Irish Land Commission v. Junkin* (2).

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It was also contended, though not very confidently, that the decree of possession operated as an estoppel in the plaintiffs' favour; a civil bill decree having, it was argued, a different effect from that of a judgment for possession in the Superior Courts, owing to the statutory provisions making such decrees final and conclusive between the parties. Whether this is so or not, it is obvious that the estoppel, if it exists, only operates to prevent the defendant from disputing the title of the plaintiff *at the date of the decree*. It cannot prevent him from proving, what is the fact here, that that title has since expired.

For these reasons I am of opinion that the order in the King's Bench Division was right, and should be affirmed.

Solicitor for the plaintiffs: *J. H. McCarroll*.

Solicitors for the defendants: *Toomey & Barber*.

J. M.

(1) 7 A. C. 235.

(2) 24 L. R. Ir. 40.

K. B. Div. . THE KING (BURROWES) v. THE JUSTICES OF
1913. CAVAN (1).

Oct. 28.

*Justices — Summary jurisdiction — Summons — Conviction — Uncertainty —
Several offences charged in summons — One conviction — Motor Car Act,
1903 (3 Edw. 7, c. 36), s. 1, sub-s. 1 — Several separate offences created by.*

By s. 1, sub-s. 1, of the Motor Car Act, 1903, if any person drives a motor car on a public highway "recklessly or negligently, or at a speed or in a manner which is dangerous to the public," he is guilty of an offence under the Act, and by s. 11, sub-s. 1, is liable on summary conviction to a fine not exceeding £50.

B. was charged before justices on a summons with having driven a motor car on the public highway "recklessly, at a speed and in a manner dangerous to the public." The justices made an order: "Defendant convicted, and fined £1."

Held, following *Rex v. Wells* (68 J. P. 392), that driving recklessly, driving at a speed dangerous to the public, and driving in a manner dangerous to the public, were separate offences; but *held* also, that, as in Ireland separate offences may be charged in one summons, the conviction was good, as amounting to a conviction of each of the offences.

Rex (Neely) v. Justices of County Down (42 I. L. T. R. 111) distinguished.

The King (Cahill) v. Justices of Dublin ([1904] 2 I. R. 698), and *Rex (Ross) v. Justices of Borough of Cork* (42 I. L. T. R. 230) considered.

CERTIORARI.

The prosecutor was defendant in a summons charging him that at the time and place therein mentioned he did unlawfully drive a certain motor car on the public highway "recklessly, at a speed and in a manner which was dangerous to the public, contrary to the statute in such case made and provided." The charge was heard before the justices at petty sessions, and an order was made by them and duly entered in the order-book setting out the complaint as in the summons, and setting out the order made as follows:—"Defendant convicted, and fined £1. Costs, £1 3s. 6d. In default to be imprisoned in Mountjoy Gaol for fourteen days without

(1) Before PALLES, C.B., and GIBSON AND BOYD, JJ.

hard labour, unless said sums be sooner paid." It further ordered the defendant to produce his licence at the next petty sessions, in order that the conviction might be endorsed thereon. K. B. Div.
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The prosecutor herein obtained a conditional order to quash the conviction on the grounds:—“(a) That said conviction was made without jurisdiction, and in excess of jurisdiction. (b) It is bad on its face. (c) It is bad for ambiguity and duplicity. (d) Several distinct offences are charged, and the conviction is general. (e) The same act on the part of the defendant is made the subject of separate and distinct offences.”

Cause having been shown on behalf of the Crown, the present application was, on behalf of the prosecutor, to make the conditional order absolute notwithstanding cause shown.

Bartley, for the prosecutor:—

The conviction is bad for uncertainty, inasmuch as there is one general conviction on a summons charging several offences: *Rex (Neely) v. Justices of Down* (1); *Rex (Ross) v. Justices of the Borough of Cork* (2); *Newman v. Bendyshe* (3). Driving recklessly, driving at a speed dangerous to the public, and driving in a manner dangerous to the public, are distinct offences: *Rex v. Wells* (4). [Palles, C.B.: That case is no authority for the proposition that the conviction here is bad. In this country more than one offence may be charged in the summons; it is different in England.] The case was decided, not on the ground that a summons can charge only one offence, but on the ground that the conviction was bad for not specifying the particular offence of which the defendant was convicted. In *The King (Cahill) v. Justices of Dublin* (5) the order, as entered in the summons-book, was in the same form as the conviction here, and the decision in that case implies that a conviction in such form would have been bad. [He also referred to *Welton v. Laneborne* (6).]

(1) 42 I. L. T. R. 111.

(2) *Ib.* 230.

(3) 10 A. & E. 11.

(4) 68 J. P. 392.

(5) [1904] 2 I. R. 698.

(6) 72 J. P. 619.

K. B. Div. *The Solicitor-General (Jonathan Pim, K.C.), and Rearden, for*
 1913. the Crown :—

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 (BURROWES) Sect. 1, sub-s. 1, of the Motor Car Act, 1903, really creates
 c. only one offence; but having regard to the decision in *Rex v.*
 JUSTICES OF *Wells* (1), we are willing to assume that driving recklessly, driving
 CAVAN. at a speed dangerous to the public, and driving in a manner
 dangerous to the public, are distinct offences, and that in England
 a general conviction on a summons such as the present would be
 bad. This, however, does not apply to Ireland, where different
 offences may be charged in the same summons. "Convicted"
 here means convicted on all the charges. In *Rex (Ross) v. Justices*
 of Cork (2) the decision was evidently on the ground that, although
 different offences had been committed on different days, the sum-
 mons on which defendant was convicted charged only one offence,
 and it was impossible to say which this was. All that was decided
 in *The King (Cahill) v. Justices of Dublin* (3) was that, assuming
 that the entry in the summons-book was bad, certiorari did not lie,
 inasmuch as the formal order subsequently drawn up was admittedly
 good.

Bartley, in reply :—

Where several charges are included in one summons, the conviction to be good must be clear and explicit, and leave no doubt that each and every one of those charges has been disposed of by judgment and adjudication: *Ex parte Stephens* (4), *per Palles, C.B.*

PALLES, C.B. :—

Our decision on the question argued in this case must depend on the difference between the law in England and the law in this country. According to the English statute, 11 & 12 Vict. c. 43, sect. 10, each summons at petty sessions must charge one offence only. There is no such provision in this country, and, therefore,

(1) 68 J. P. 392.

(2) 42 I. L. T. R. 111.

(3) [1904] 2 I. R. 698.

(4) Judgments of Superior Courts
 in Ireland, 297, at p. 312.

under our law a summons which charges more than one offence is not necessarily bad. K. B. Div.
1913.

The enactment on which the question arises is sect. 1, sub-s. 1, of the Motor Car Act, 1903 (3 Edw. 7, c. 36), which is as follows:—
 “If any person drives a motor car on the public highway recklessly or negligently, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the highway, and to the amount of traffic which actually is at the time, or which might reasonably be expected to be, on the highway, that person shall be guilty of an offence under this Act.” (BURROWES)
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Now, it has been held in England, in *Rex v. Wells* (1), that driving at a speed which is dangerous to the public, and driving in a manner dangerous to the public, are separate offences. The summons in the present case charges that the driving was unlawful because it was reckless, because it was at a speed, and because it was in manner, dangerous to the public; and were the case to be decided in England, it would be held, following *Rex v. Wells* (1), that the summons was bad, and that a conviction of guilty on it would be of no avail. But in this country this is not so. We have, then, to see what was the decision of the justices.

The summons alleges that the defendant unlawfully drove a certain motor car on the public highway “recklessly, at a speed and in a manner which was dangerous to the public.” That allegation involves each of the three grounds of illegality, and the decision of the magistrates entered opposite the complaint is “defendant convicted.” This is an affirmation by the magistrates that the driving was of the character charged, that is, that it was reckless, that it was at a speed, and that it was in a manner, dangerous to the public; and were it not for the decisions to which I shall refer, I should have thought that, having regard to the provisions of the Petty Sessions Act, 1851, the conviction was plainly right.

Now, is there any decision preventing us from so holding? In my opinion there is not.

Practically only two decisions were relied on, because no

(1) 68 J. P. 392.

K. B. Div. substantial reliance was placed on *Rex (Neely) v. Justices of Co.*
 1913. *Down* (1). That case, had it been relied on, could be accounted for
 REX by the conviction being for the "said offence," in the singular.
 (BURROWES) v. But the other two cases require careful consideration.

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 CAVAN.

Palles, C.B.

The first to which I refer is *The King (Cahill) v. Justices of Dublin* (2). There, there was a charge of driving recklessly and at a speed dangerous to the public; and if there had been an actual decision of the Court that such a summons was bad, of course it would be a decision against the affirmance of the present conviction, and we should be obliged either to follow it or to allow the case to stand for argument before a fuller Court. But there is no such decision. It was assumed there that the conviction on such a summons would be bad; and it is well settled law that, in the language of Lord Halsbury, a point overlooked is not a point decided. It appears to have been overlooked by counsel for the justices in *Cahill's Case* (2) that, in consequence of the distinction between the law in England and in Ireland, the summons was not necessarily bad. I am of opinion that the point was overlooked, and therefore not decided.

The second case is that of *Rex (Ross) v. Justices of the Borough of Cork* (3). The question arose upon a summons in which there were charges in respect of alleged offences upon two separate days. In my opinion such charges are allowable according to the law in this country; but the attention of the Lord Chief Justice not being called to the distinction between the law in the two countries, he assumed that the summons would be bad if it charged offences on more than one day; and finding them charged as having been committed on two days, and no mention of any particular day in the conviction, he assumed that the conviction was bad for ambiguity, as it would have been according to English law. That was a decision on the construction of the summons before him, and I do not think that a decision on the construction of a summons in one case is any authority upon the construction of another different summons before a different Court.

I am therefore of opinion that neither of these two cases is

(1) 42 I. L. T. R. 111.

(3) 42 I. L. T. R. 230.

(2) [1904] 2 I. R. 698.

an authority which prevents us giving effect to the view we entertain of the particular case before us. My opinion is clear that the summons is good, and the conviction valid.

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GIBSON, J.:—I agree.

Our decision depends on three points.

First, was the summons valid? It contains several charges arising out of the same facts. It would have been better to have put them in distinct paragraphs; but the summons, which must be interpreted according to its legal effect, is not invalidated by any such want of form, it being clear that in Ireland a complaint may embrace more charges than one.

Secondly, it is urged that a conviction on any one charge made it impossible to convict on any of the others. Assuming that, if there had been separate prosecutions, the maxim *nemo debet bis revari pro eadem causâ* would have been applied after the first conviction, the complaint here was like an indictment containing various charges based on the same *causa*, viewed in different penal aspects, on all of which a conviction may be legitimate.

The third point is the meaning of the conviction column in the order-book—a pure matter of construction. The nature of our petty sessions record, the relation of the conviction to the summons, and the difference between English and Irish procedure, have been discussed in several recent cases, of which the *Athy Case* (1) is the latest. It is not alleged that the punishment awarded was inappropriate to any of the charges, if proved; the only question is, does the conviction record extend to all the charges or only to some, in which latter event it would be uncertain. I am of opinion that the defendant was found guilty of each of the offences, and was punished accordingly. The record shows no uncertainty or error.

As to the cases cited at the Bar, they have been distinguished by my Lord, and I need not discuss them.

Boyd, J., concurred.

Solicitors for the prosecutor: *O'Neill & Collins*.

Solicitor for the Crown: *Sir Malachy Kelly*.

J. G. T.

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1913.

June 6.

THE KING (MULHOLLAND) *v.* THE JUSTICES OF MONAGHAN (1).

Justices—Order to find sureties for the peace and good behaviour—Bona fide question of title—Showing jurisdiction on face of order.

The fact that threats, or an assault, which would authorize justices in requiring sureties for the peace and good behaviour, arose by reason of a bona fide dispute as to title, does not oust the jurisdiction of the justices to require such sureties.

An order of justices, setting out a complaint that defendant used threatening language to complainant, thereby putting him in fear and dread of the defendant, and ordering the defendant to enter into recognizances to keep the peace and be of good behaviour, sufficiently shows on its face jurisdiction to make such order.

The King (Boylan) v. Justices of Londonderry ([1912] 2 I. R. 374) explained.

CERTIORARI.

The prosecutor was defendant in a summons, in which Michael Monaghan was complainant. The material portion of the summons was as follows :—

“Whereas a complaint has been made to me that you, the said defendant, on the 11th day of March, 1913, at Ballintra, in said county, did use threatening language to complainant, thereby putting him in fear and dread of you This is to command you to appear . . . and to show cause why you should not be bound to keep the peace, and be of good behaviour.”

The summons was heard by the justices at petty sessions. From the evidence given, it appeared that the defendant had a right-of-way over the lands of the complainant; that a dispute arose with reference to the repairing by the complainant of a wall on his lands adjoining this way, the defendant alleging that the repairs would interfere with the free passage along the way; and that on the day mentioned in the summons the defendant threw

(1) Before PALLES, C.B., and MADDEN, J.

some of the stones from the wall into the complainant's field, and used the threatening language complained of. The complainant swore that he was in fear and dread of his life from the defendant.

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The defendant's solicitor contended that the jurisdiction of the justices was ousted, inasmuch as the threats arose out of a bona fide dispute as to a question of title. The complainant's solicitor contended that the jurisdiction to bind to the peace for threatening language was not ousted by the fact that a question of title was the origin of the dispute.

The justices made an order, the certificate of which, signed by one of the justices, was to the following effect:—

I certify that upon hearing a complaint that defendant on the 11th day of March, 1913, at Ballintra, in said county [Monaghan], did use threatening language to complainant, thereby putting him in fear and dread of defendant, and to show cause why he should not be bound to keep the peace and be of good behaviour, an order was made on the 11th day of April, 1913, by the justices present against Patrick Mulholland of Ballintra to the following effect, viz.:—It is ordered that the defendant do forthwith enter into a recognizance in the sum of £5, with two sureties in the sum of £2 10s. each, to keep the peace and be of good behaviour towards all His Majesty's subjects, and especially towards the complainant, for the term of twelve calendar months now next ensuing, and it is adjudged that if the defendant fail to comply with this order he be imprisoned in Dundalk Gaol for the space of one calendar month unless the said recognizance be sooner entered into.

The prosecutor obtained a conditional order for a writ of certiorari to quash the order of the justices on the grounds—(1) That a bona fide question of title was involved in the determination of the complaint; (2) That the order was bad on its face, because it did not state on its face the facts necessary to give the justices jurisdiction to bind the prosecutor to be of the peace and of good behaviour. Cause having been shown on behalf of Michael Monaghan, the complainant in the summons, the present application was to make the conditional order absolute, notwithstanding cause.

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Cusack (with him *James O'Connor, K.C.*), for the prosecutor:—

The case involved a bona fide dispute as to title, which ousted the jurisdiction of the justices. But even assuming that the justices had jurisdiction to bind to the peace and good behaviour, the conviction is bad, inasmuch as it does not show on its face facts necessary to give the justices such jurisdiction: *The King (Boylan) v. Justices of Londonderry* (1).

Robert Doyle, K.C., and *Vincent Rice*, for Michael Monaghan:—

The circumstance that the threats were made in connection with a dispute as to title does not oust the jurisdiction of the justices to require sureties of the peace and good behaviour. The conviction incorporates the summons, which sets out matter sufficient to give the justices jurisdiction. [They referred to *Rex v. Wilkins* (2).]

O'Connor, K.C., in reply.

PALLES, C.B.:—

There is some misapprehension as to the decision in *The King (Boylan) v. Justices of Londonderry* (1). The decision there was no more than that an order of justices requiring a person to find sureties to keep the peace must show on its face facts necessary to give jurisdiction. It only applied the most elementary principle. Neither I nor Mr. Justice Gibson suggested that the validity of an order of justices to give security for the peace depended on any other principle than did their order in an ordinary case. When a justice of the peace directs a person to do any particular act, the order must show on its face the jurisdiction of the justice to make such an order.

In *Boylan's Case* (1) there was a summons for assault, but there was no jurisdiction in the magistrates to decide the charge of assault, because a bona fide question of title arose; so that the question of assault being undecided, jurisdiction was not given to the justices to order sureties by the fact of the assault, if there

were nothing more than an assault, as, for instance, a probability of its repetition, and in that case absolutely nothing of that kind was shown. As stated by Mr. Justice Gibson:—"A charge of assault, not decided, does not *itself* justify an order binding over." In the present case, the summons asks that the defendant should be bound over in sureties of the peace, alleging as ground therefor the putting of the complainant in fear by threats. That is the very state of facts that justifies the magistrates in making an order for sureties, and the only question is whether there is jurisdiction to make it where the threats are made in respect of a matter as to which the jurisdiction of the justices is ousted by reason of a bona fide dispute as to title being raised. In my experience in Ireland, the most dangerous assaults, sometimes ending in loss of life, have arisen by reason of disputes in reference to title—disputes as to rights of way, rights of turbary, and matters of that description. I am of opinion that the fact of an assault arising out of a dispute as to title does not deprive the magistrates of jurisdiction to take all the surrounding facts into consideration, and to determine whether the case is one in which one or both of the parties should not be bound to the peace, and on this ground I think that the order here is unassailable.

MADDEN, J., concurred.

Solicitors for the prosecutor : *Corr & O'Connor.*

Solicitor for Michael Monaghan : *P. J. Kerley.*

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Dec. 13.

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Practice—Costs—Taxation—Action which could have been brought in county Court—Costs of more than two counsel—Effect of absence of certificate for, in subsequent proceedings—Certificate given on day after trial—Order LXV, Rule 65, sub-rule 41.

It is provided by Order LXV, Rule 65, sub-rule 41, that "the costs of more than two counsel shall not be allowed in causes or matters which in the case of a plaintiff, having regard to the amount recovered . . . could have been brought in the County Court, unless the Judge at the trial shall certify under his hand, on the certificate of the registrar or other proper officer, that more than two counsel were reasonable or proper . . ."

The plaintiff obtained a verdict for £40 in an action of negligence tried by a Judge and jury. The Judge gave a certificate, allowing three counsel, on the morning following the day on which the trial had concluded, which was held by the Court of Appeal to be too late.

Held, by the Court of Appeal (reversing the decision of the King's Bench Division), that the provision in sub-rule 41, disallowing the costs of more than two counsel in the absence of a certificate, is not confined to the trial of the action, but applies to subsequent proceedings; and that the plaintiff could not be allowed the costs of more than two counsel on an application to the King's Bench Division for a new trial and an appeal from their decision to the Court of Appeal.

MOTION to review taxation.

The action, which was brought to recover damages for injuries sustained by the plaintiff by reason of the negligence of the defendants in the management of their tramway system, was tried before Dodd, J., and a special jury of the county of the city of Dublin. At the close of the case a number of questions were left to the jury, and answered by them, including the question, "Damages (if any)?" to which the answer was "£40." The portion of the report of Dodd, J., material for the purposes of the present report was as follows:—

"The verdict being under £50, I suggested to counsel that the

(1) In the King's Bench Division before MADDEN and KENNY, JJ.

matter might be closed if I gave judgment for the amount and refrained from giving any special order as to the costs of three counsel and instructions. Mr. Serjeant Moriarty [of counsel for the plaintiff] was indignant and said he would not ask for judgment. Mr. Serjeant Sullivan [of counsel for the defendants] would make no concession. I said I would refrain from giving judgment, and the Court rose. I thought over the attitude of the jury in the evening, and was satisfied that the distinction they drew was sound . . . I had the leading counsel before me in the morning. I said I thought I ought to give judgment in accordance with the view of the jury, and having regard to the nicety of the law and the importance of the case, I should not refrain from giving the certificates for costs. Mr. Serjeant Sullivan strenuously objected. He said Serjeant Moriarty had refused to ask for judgment the evening before, and there was a recent authority that when counsel refrained from asking for judgment he could never again move. I said it would take a strong case to satisfy me that a statement of the kind made in a moment of strain caused by the waywardness of the Judge was to stand in the way of justice. I accordingly gave judgment with costs and certificates."

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The defendants applied to the Divisional Court for an order that the verdict and judgment should be set aside, and a verdict and judgment entered for the defendants, on the grounds (*inter alia*) that there was no evidence of negligence in the defendants, and that the learned Judge had no power to certify for costs after the trial had concluded, and after the counsel for plaintiff had announced that he would not accept the verdict because it was inadequate. The Divisional Court (Palles, C.B., and Madden and Kenny, JJ.) held that there was sufficient evidence to sustain the finding of the jury in favour of the plaintiff, and that the certificate as to costs was given "at the trial" within the meaning of Order 65, Rule 65 (41), and refused the defendants' motion with costs.

The defendants appealed to the Court of Appeal (O'Brien, L.C., and Holmes and Cherry, L.JJ.).

The Court of Appeal on the 17th June, 1913, made an order varying the order of the King's Bench Division, by directing that the Judge's certificate that three counsel should be allowed should

K. B. Div. be cancelled, and, subject to such variation, affirming the said
 1913. order and dismissing the appeal with costs, to be paid by the
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The plaintiff was represented by three counsel throughout all the proceedings. In the bill of costs lodged for taxation, the plaintiff included the costs of three counsel on the new trial motion, and on the appeal. The defendants objected to the costs of a third counsel being allowed in these proceedings, and the taxing-master allowed the objection of the defendants, stating in his ruling that he did so having regard to Order 65, Rule 65, sub-rule 41, and to the order of the Court of Appeal.

The present application was on behalf of the plaintiff to review the decision of the taxing-master.

Gibson, K.C., and *Hubert Hamilton*, for the plaintiff.

Norwood, K.C., and *Sainsbury*, for the defendants.

Dec. 13.

MADDEN, J. :—

This was an action of negligence, tried before my brother Dodd on the 12th February, 1913, in which serious questions of law and of fact were involved. The jury assessed the damages at £40. The action consequently was one which could have been brought in the County Court.

By Order LXV, Rule 65, sub-rule 41, it is provided that in causes or matters of this class the costs of more than two counsel shall not be allowed, unless the Judge at the trial shall certify under his hand that more than two counsel were reasonable and proper.

The question for our decision is, whether the prohibition of the allowance of more than two counsel without a certificate signed by the Judge, applies only to the trial of the action at which it is to be given, and in regard to which the discretion vested in the Judge is to be exercised, or has a wider application extending to every step in a cause or matter which could have been brought in the County Court.

In the present case the learned Judge gave the certificate required by this rule. It was given, not at the trial of the action,

but on a subsequent day. The case came before this Court on a motion for a new trial, and an order was made on the 6th of May, 1913, which was varied by an order of the Court of Appeal, dated the 17th of June, 1913, by directing that the Judge's certificate that three counsel should be allowed should be cancelled. The result was that the plaintiff retained his verdict for £40 with costs of the trial, and with costs of the new trial motion and of the appeal. On the taxation the costs of three counsel at the trial were not claimed, and could not have been allowed, the certificate required by sub-s. 41 having been set aside as not given at the trial. The taxing-master disallowed the costs of three counsel on the subsequent proceedings in this Court and in the Court of Appeal, but in so doing he acted, not in the exercise of his discretion, but in obedience to what he regarded as the effect of the prohibition in this rule to which I have referred.

The question which we have to decide was suggested, but not decided, in *Reynolds v. Enfield Cycle Co.* (1). There, a judgment for £193 11s. 3d. was, by an order of the Court of Appeal, reduced to one for £41 2s. 7d. It was held that the case was, as the consequence of this reduction, brought within Order LXV, Rule 65, sub-rule 41. From the course that the case took, it was not possible to obtain the requisite certificate at the trial, and accordingly it was held by this Court and by the Court of Appeal that more than two counsel could not be allowed at the trial. The taxing-master in the exercise of his discretion allowed no more than two counsel on the hearing of the case in the Court of Appeal, and this Court refused to interfere with his discretion. The rule governed the trial of the action; "whether it applies to counsel on a new trial motion or to counsel on an appeal, does not arise here, and is a matter that must be determined hereafter. I think the question is an important one, and I am unwilling to give opinions as to the construction of those rules that do not absolutely and necessarily arise" (*per* Palles, C.B., pp. 206, 207). The case came before the Court of Appeal, and there again the question did not arise for decision. FitzGibbon, L.J., is reported as saying: "As regards the disallowance of a third

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(1) 3 New Ir. Jur. Rep. 205.

K. B. Div. counsel in the Court of Appeal, I will not now decide the construction to be put on the rule, though I cannot see how the words 'the costs of more than two counsel . . . in causes and matters' can by any possibility be limited in their application." Holmes, L.J., offered no opinion as to whether the rule relating to two counsel applies to the Court of Appeal.

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It is not easy to see why the exercise by the Judge at the trial of an action of his discretion as to the reasonableness of the employment of more than two counsel should govern subsequent proceedings in the case, the circumstances and requirements of which could not have been in his contemplation when he gave his certificate. The cases in which it has been held that the certificate cannot be given after the trial has concluded are founded on the principle that the facts and circumstances of the trial ought to be fresh in the recollection of the Judge when he exercises his discretion in giving or withholding the certificate. A certificate of a somewhat similar kind was the subject of discussion in *Shallworth v. Cooper* (1), where Maule, J., said: "It is not necessary to enter into the question whether or not the certificate under this statute must be granted immediately, but I should say that it was the intention of the Act to exclude any impression being made on the mind of the Judge, except what was made at the trial."

The relevancy of a certificate to facts and requirements which were present to the mind of the Judge two days before it was given is presumably greater than its relevancy to facts and requirements which had no existence at the time of the trial. The requirements of the subsequent proceedings bear no fixed ratio to those of the trial. It would be easy to refer to cases of historical importance where legal questions of difficulty and far-reaching effect have been evolved when the initial trial was little more than a formality. The litigation in which the title to the great Hertford estate was contested is a well-known example. If a certificate were to be given in such a case, it would be more with reference to future possibilities following from the magnitude of the interests involved than to the issue at the trial. On

(1) 1 M. & G. 824.

the other hand, after a trial of great importance some unimportant question of procedure or of costs may remain for decision, in regard to which the employment of three counsel might be unreasonable. The principle that there are a number of cases which on the trial of the action are of great simplicity, but in which serious questions of law may afterwards arise, was recognized by this Court in *Northcroft v. Delany* (1). In this case the taxing-master disallowed three counsel on a motion for judgment. Only two counsel had been employed at the trial at the assizes, and on this ground the taxing-master thought he was precluded from allowing three counsel on the motion for judgment, although he would have allowed them if he had regarded himself as free to exercise a discretion in the matter. This Court sent the case back to the master, with a statement that there was no such rule as he had supposed, and with a direction that three counsel should be allowed.

The rule, as FitzGibbon, L.J., pointed out, is universal in its application to all causes and matters; but it certainly does not in terms apply to all proceedings in a cause or matter; and whether it should be so applied is, in my opinion, a question to be decided having regard to the words of the rule and to the nature of the case. The particular proceeding in a cause or matter to which it in terms applies is the trial, and the words used, so far from suggesting its application to any further proceeding, suggest, by limiting the question of reasonableness to what had taken place before the Judge at the trial, that the certificate has the same exclusive relation to the trial as the discretion to be exercised by the Judge on which it was founded. If the words of the rule were plain and unambiguous, effect must be given to them, even if the result were inconvenient and unreasonable. But when they are uncertain, and capable of two interpretations, regard should be had to the mischief in view of which the rule was framed, and to the intentions which may reasonably be attributed to its framers.

The case should be remitted to the taxing-master, with a declaration that the rule as to the obtaining of a certificate of the

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(1) 34 I. L. T. R. 183.

K. B. Div. Judge is inapplicable, and that the allowance or disallowance of more than two counsel is a matter in regard to which he should exercise his discretion.

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KENNY, J.:—

I concur in thinking that this bill of costs must be remitted to the taxing-officer for reconsideration, and in doing so I desire to say that this point on the construction of the general order being quite a new one, and untouched by authority save the dictum of FitzGibbon, L.J., in *Reynolds v. The Enfield Cycle Co.* (1), the taxing-officer can scarcely be blamed for making the ruling which he did. That opinion of FitzGibbon, L.J., was not concurred in either by the Lord Chief Baron or Holmes, L.J., and was unnecessary for the decision of the case then before the Court. It was a mere dictum which, though entitled to respect, is not binding on this Court. The question was not, so far as I can judge from the report, fully, or indeed at all, argued, and it seems to be uncovered by other authority.

The construction of the general order only becomes material when two things concur, viz., the existence of a cause or matter that could have been brought in the County Court, and the absence of a certificate for a third counsel; and it is contended that in such a case there is an absolute prohibition under the order against the allowance of more than two counsel in any subsequent stage of the cause or matter, no matter how contentious such stage might have become or what complications or developments might have taken place. In other words, the absence of the certificate stereotypes the suit in all its stages as one in which the taxing-officer, no matter what his opinion of the gravity of the case may be, is precluded from allowing a third brief.

It seems to me that such a contention might lead in certain cases to irrational and unfair results. The present case is a fair example. The foundation of the general order is, that there may be cases in which, though the action might have been brought in the County Court, the circumstances, either in law or fact or both, may be so important as to justify the employment of more than

(1) 3 New Ir. Jur., at p. 207.

two counsel. Dodd, J., on the morning following the trial gave the necessary certificate that more than two counsel were reasonable and proper so far at least as the trial was concerned. By a mere technicality that certificate has not stood the ordeal of the Court of Appeal, which, over-ruling the Divisional Court, held that this certificate was not given "at" the trial, inasmuch as they held that for certificate purposes the trial had ended on the day before, so that it was a mere chance that deprived the plaintiff of an effective certificate. Other combinations of circumstances might be referred to with a like result. And in such a case we are asked to hold that though a certificate would have been reasonable and proper, and though the party has paid the penalty, so far as the trial is concerned, for not obtaining it, he is to be penalized at every subsequent successful step in this action in the same manner.

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The only judicial support for the defendants' contention is the dictum of FitzGibbon, L.J., to which I have referred. His commentary on the general order appears to me to beg the question. He says (p. 207)—if he is properly reported—that he cannot see how the rule can be limited in its application, and then lays down the proposition that it applies to all costs wherever the case goes. The Chief Baron and Holmes, L.J., say that they abstain from expressing any opinion. If the rule does not apply to subsequent stages of a cause or matter, the allowance of a third counsel at such further stage becomes a question for the discretion of the taxing-officer, unfettered by the rule. Such discretion was exercised in *Aaron's Reefs v. Twiss* (1), in which case we have ascertained from the record that no certificate was given at the trial, and yet the third counsel was allowed on a new trial motion. No doubt the point does not seem to have been raised, but it is hard to conceive that a Court of which the Chief Baron and Andrews, J., were members, would not have noticed such a very obvious answer to the allowance of the third brief, if the general order bore the construction now contended for by the defendant.

In support of that contention, the words "in causes and matters" at the beginning of the sub-rule are appealed to as

(1) [1894] 2 I. R. 244.

K. B. Div. demonstrating that the rule is an all-pervading one, and it is
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argued that an action does not cease to be a "cause" on an application for a new trial, whether in the King's Bench or in the Court of Appeal, and, therefore, the rule necessarily applies to the same extent as at the trial. In my opinion that is not a proper test by which to construe it, and I think we must take the rule as a whole and see if it be unrestricted in its application. If it were intended to deprive the taxing-officer of a discretion with regard to a third brief, not only at the trial but at subsequent stages, one would expect to find clearer expressions for the purpose than are contained in the general order. The object and effect of sub-rule 41 are to control the discretion vested in the taxing-officer by sub-rules 37 and 38, which deal with fees and allowances at every stage of a suit. The words of sub-rule 41 do not, to my mind, suggest a limitation beyond the trial stage. The question is not to be governed by such authorities as *M'Govern v. M'Namara* (1), where the costs of a demurrer were held to be subject to the limitation, or *Fitzgerald v. O'Connor* (2), where the costs of a motion for final judgment were clearly held to be within it. These were examples of proceedings before and leading up to final judgment. The Judge at the trial, in refusing a certificate, has no materials for judging of the further developments in the action, or of their complexity or gravity; and it seems to me to be opposed to reason and principle that the rule, even if its language be ambiguous, should be extended in its operation to proceedings subsequent to the trial. A decision on the present question will necessarily be a guide not only as to the effect of this 41st sub-rule, but also in other cases of limitation on the amount of costs recoverable in actions for libel, contract, and tort, pursuant to rules 1, 2, 3, and 4 of the same general order. Take as an example an action for libel, when the plaintiff fails at the trial but the verdict for the defendant is set aside with costs of the motion to be paid by the defendant, and the plaintiff at a new trial obtains a verdict for under 40s. (Judicature Act, sect. 53; Order LXV, Rule 1); are the costs of the argument on the new trial motion not to exceed the amount of the damages, because the Judicature Act

(1) 12 Ir. C. L. R., App. xv.

(2) 32 I. L. T. R. 43.

enacts that in all actions for libel the plaintiffs shall not be entitled to more costs than damages in the case of verdicts for under 40s.? Or, suppose in an action of contract there is a verdict against the plaintiff which is afterwards set aside with costs to be paid by the defendant, and a subsequent trial results in a verdict for a sum under £20, and no certificate within Order LXV, rule 3, is obtained, is the plaintiff thereby deprived of his full costs of the motion for the new trial? I do not think the affirmative of those questions could for a moment be sustained. If it could, the result would be that these costs would remain in a state of suspension pending the result of the second trial.

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I am very clearly of opinion that such proceedings as new trial motions could not in reason be, and are not, within the provisions of sub-rule 41.

A. E. C.

The defendants appealed (1).

Sergeant Sullivan, K.C., and Sainsbury, for the appellants:—

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This is a party and party taxation; and rule 19 of Order LXV is absolutely conclusive. It provides that "the costs and fees payable to solicitors in respect of business transacted by them in or before the High Court, or Court of Appeal, or any divisional or other Courts thereof, shall be those prescribed by the rules of this order, and, save as hereinafter provided, no other costs or fees shall be charged . . ." In *Reynolds v. Enfield Cycle Co.* (2), rule 19 of Order LXV was not cited. In this case, since no certificate was got sufficient to satisfy sub-rule 41 of rule 65, the costs of two counsel and no more can be allowed.

W. G. Gibson, K.C., and Hubert Hamilton, for respondent:—

The question is, does the certificate apply to every proceeding in the action, to matters subsequent to the trial of the action as well as those at the trial? *Aaron's Reefs v. Twiss* (3) is an authority in our favour.

(1) In the Court of Appeal before O'BRIEN, L.C., and HOLMES and CHERRY, L.JJ.

(2) 3 N. I. J. R. 205.

(3) [1894] 2 I. R. 242.

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O'BRIEN, L.C. :—

This case involves the consideration of sub-rule 41 of Order LXV, rule 65, and in its peculiar circumstances is not distinctly covered by authority, and although the rule might have applied in *Aaron's Reefs v. Twiss* (1), I am satisfied that it was not considered in the same connection in which we have to consider it now, if at all. In the present instance there was an action for damages for negligence. The case was tried before Mr. Justice Dodd; but he did not give a certificate under sub-rule 41 of rule 65 of Order 65. No doubt it is probable, from what took place on the day following the trial, that he intended to give such a certificate, but this Court has decided that it was too late to give that certificate on the morning following the day on which the trial had concluded; and we must now take the case as being plainly within the operation of sub-rule 41, with no certificate given under the latter part of the rule. This rule in its essence aimed at the limitation of costs, and it does that in words which to my mind do not admit of reasonable doubt: "The costs of more than two counsel shall not be allowed in causes or matters which in the case of a plaintiff, having regard to the amount recovered or paid in settlement, or the relief awarded, and in the case of a defendant, having regard to the amount sued for, or the relief claimed, could have been brought in the County Court." That is the first clause of the rule, and if you take the words simply as they stand, they are perfectly general, and they stamp every case as a "two-counsel" one where the test applied by the rule operates. Two counsel in the case is the maximum. Taking these words alone, I can see nothing that would limit their operation, or remove the "two-counsel" stamp from the proceedings subsequent to the trial. The only argument that could be offered to induce us to say that the "two-counsel" stamp, as I call it, does not apply to the proceedings subsequent, is one based on the words, "unless the Judge at the trial shall certify under his hand, on the certificate of the Registrar or other proper officer, that more than two counsel were reasonable and proper." These words, it seems

(1) [1894] 2 I. R. 242.

to me, confer the only means which on the face of sub-rule 41 enable the party to get out of the disqualification which the first part of the sub-rule imposes. If that certificate is not obtained, as it was not in this case, I fail to see how the first part of this rule can be read in any way save so as to cover every case where the County Court test is to be applied. The words in the first part seem to me to be general, and therefore applicable to all proceedings in the action. When the Judge gives his certificate with regard to what is before him, he takes the case out of the operation of the general part of the rule. If he does not do that, the case remains a "two-counsel" case in all proceedings, whether prior or subsequent to the trial. That is my view of the construction of this rule. I have not excluded from my mind the reasons which prevailed with the two Judges in the Court below, but, giving the utmost consideration to those reasons, my opinion is that you cannot construe the plain words of the rule in any other way than the words themselves, as I conceive, express.

Once the rule is settled, I do not think any hardship will arise in future, for every person will know where he is if the certificate is not given, and I am perfectly satisfied the rule will work out equitably. If there is any hardship, it is one created by the rule, and can only be remedied by alteration of it.

HOLMES, L.J.:—

I concur. I do so on the ground that it is impossible to give any other construction to the words of sub-rule 41 than that placed upon them by the Lord Chancellor.

CHERRY, L.J.:—

I concur. In questions of practice the course always has been to follow the words of the rule. When we get into considerations of hardship and such like, we are on rather slippery ground.

[Appeal allowed with costs.]

Solicitors for appellants: *Redington and Sainsbury.*

Solicitor for respondent: *A. L. Joynt.*

J. M.

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April 18.

Justices—Summary jurisdiction—Complaint—Summons sent to justice by complainant's solicitor in letter—Jurisdiction of justice to issue summons without further complaint—Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), s. 10.

A solicitor sent by post a summons, in which his clients were named as complainants, to a justice, accompanied by a letter stating that the summons was for the next petty sessions, and asking the justice to sign it. The summons set out the nature of the complaint, which would have justified the issue of a summons.

Held, that the letter and the summons constituted a sufficient "complaint" within s. 10 of the Petty Sessions (Ireland) Act, 1851, and that the justice had jurisdiction to issue the summons.

Where a solicitor states to a justice that he is instructed by his client to apply for a summons, and states to him matters which would justify the issue of the summons, the justice is bound to issue it, unless he disbelieves, or has reasonable grounds to doubt, the statement.

CASE STATED by justices under 20 & 21 Vict. c. 43. The material facts as set out in the case were as follows:—

At a petty sessions held for the petty sessions district of Limavady, county Londonderry, the respondent was charged as defendant in a summons, in which the appellants were complainants, for that the defendant, being the employer of one James Devenny, an employed contributor within the meaning of the National Insurance Act, 1911, failed to pay certain contributions of 5½d. each, which under the said Act, and the regulations made thereunder, he was liable to pay in respect of the said James Devenny, for the weeks mentioned in the summons.

At the hearing of the summons it was proved on behalf of the complainants by J. C. Austin, one of the inspectors under the National Insurance Act, that the defendant had not paid the contributions, and had stated that he had made up his mind

not to comply with the Act. The witness on cross-examination stated that he brought the facts under the notice of the Insurance Commissioners, but he had nothing to do with the issuing of the summons.

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Mr. D. MacLaughlin, the solicitor for the complainants, stated that he was instructed by the Insurance Commissioners to bring the summons, which he sent to Mr. J. D. Boyd, one of the justices present, accompanied by a letter asking him to sign the enclosed summons and others, one of them being the summons then before the Court.

It was contended on the part of the defendant that the summons was irregularly and illegally issued, and that the proceedings were irregular, on the ground that previous to the issue of the summons no complaint was made to the magistrate who signed the summons, and no leave given by the magistrate to issue the summons, and that the signing of the summons was not a sufficient compliance with the provisions of sect. 10 of 14 & 15 Vict. c. 93. It was contended on the part of the complainants that the defendant had appeared in answer to the summons, and was properly before the Court, and that a complaint had been made, and that the summons had been signed by a magistrate who had jurisdiction.

Mr. J. D. Boyd stated that he had received no complaint prior to the issuing of the summonses, which he received from Mr. MacLaughlin together with a letter asking him to sign the same. He produced the letter of which the following is a copy :—

“COLERAINE,

“21st February, 1913.

“J. D. BOYD, Esq., J.P.

“Insurance Commissioners v. Trench.

“DEAR MR. BOYD,

“I enclose sixteen summonses and copies for next Limavady Petty Sessions against Mr. Trench, and I should feel much obliged if you will sign them. My son will call with you on Monday to get them, and hand them to the clerk of petty sessions.

“Yours faithfully,

“D. MACLAUGHLIN.”

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Mr. Boyd further stated that the summonses were a new thing, and that he thought he was bound to sign them, but in so doing without a complaint having been previously laid, he had departed from his practice for twenty years for the first time.

The majority of the justices, being of opinion that a complaint had not been made, and that therefore the case was not legally before the Court, ordered that the summons should be dismissed without prejudice. On the requisition of the complainants they stated the present case, seeking the opinion of the Court as to whether they were correct in their determination.

R. J. Sheehy (with him, the *Attorney-General* (*Molony, K.C.*)), for the appellants:—

The complaint set out in the summons, taken in conjunction with Mr. MacLaughlin's letter, amounted to a "complaint" within the meaning of s. 10 of the Petty Sessions Act, sufficient to give Mr. Boyd jurisdiction to issue the summons. By sub-s. 1 of that section where, as in the present case, it is intended that a summons only shall issue, the complaint may be made without oath if the justice shall see fit. Even if there had been no complaint at all, as the defendant was before the justices at petty sessions, and the charge was made in his presence, they had jurisdiction: *Reg. v. Hughes* (1).

Denis Henry, K.C., and *A. P. Henry*, for the respondent:—

The last paragraph of s. 10 of the Petty Sessions Act provides that where the information or complaint is in writing, the person against whom it is made is entitled to a copy; and the original is not to be allowed out of the possession of the clerk of petty sessions. This shows that the "complaint" is not the statement in the summons. Mr. MacLaughlin, by merely sending the summons, did not assert the truth of the statements contained in it. A magistrate ought not to issue a summons without having ascertained that there is a *prima facie* case against the person summoned: *Dixon v. Wells* (2), *per*

(1) 4 Q. B. D. 614.

(2) 25 Q. B. D. 249.

Lord Coleridge, C.J. (p. 254). In that case the fact that the defendant appeared under protest was held to distinguish it from *Reg. v. Hughes* (1). Here the defendant likewise appeared under protest. This case is further distinguishable from *Reg. v. Hughes* (1), on the ground that in that case the magistrates convicted, while in the present case they dismissed the summons. [He also referred to *Reg. (Murphy) v. Justices of Wexford* (2).]

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The Attorney-General, in reply.

PALLIS, C.B.:—

We do not think that there is any necessity for reserving judgment, as everything has been fully brought before us by counsel. I do not entertain any doubt that there was jurisdiction to hear these cases, and that Mr Butler and Mr. Murphy, the resident magistrates, and the other dissenting magistrates, were correct in their view.

The question of jurisdiction depends on the words of sect. 10 of the Petty Sessions Act, 1851:—"Whenever a complaint shall be made to any justice as to any other matter arising within the limits of his jurisdiction, upon which he shall have power to make a summary order, it shall be lawful for such justice to receive such information or complaint, and to proceed in respect to the same, subject to the following provisions: 1. Whenever it is intended that a summons only shall issue to require the attendance of any person, the information or complaint may be made either with or without oath, and either in writing or not, according as the justice shall see fit."

Now, this was a matter in which the justice had power to make a summary order, and in such case the duty of the justice is described by Matthew, J., in *Dixon v. Wells* (3). He says:—"The summons is a citation proceeding upon an information or complaint laid before the magistrate who issues the summons, and conveying to the person cited the fact that the magistrate is satisfied that there is a *prima facie* case against him" (p. 257).

(1) 4 Q. B. D. 614.

(2) 27 I. L. T. R. 126.

(3) 25 Q. B. D. 249.

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Palles, C.B.

The case is one in which it was not necessary that there should be an information in writing, as it was not contemplated that a warrant should issue, so that sub-s. 1 of sect. 10 of the Petty Sessions Act applies. I entirely agree that the justice was not bound to issue this summons on the letter of Mr. MacLaughlin. He could have returned the letter and the summons, and said : "I do not think that this is a proper way to apply for a summons." In that case Mr. MacLaughlin would have been entitled to have gone to him and said : "I am instructed by the Insurance Commissioners to ask for a summons against Mr. Trench, complaining of the non-payment of a certain number of sums of $5\frac{1}{2}d.$ per week in respect of his servant, James Devenny. I am instructed by them that he has not paid the amount." This would have been quite sufficient to have justified the magistrate in issuing the summons. Suppose the magistrate had said : "I will not issue the summons ; I am not satisfied with your statement, I will require that there be a complaint on oath" ; then it might have been necessary for Mr. MacLaughlin to procure an information on oath. But this was not necessary in the present case, since it was not required by the magistrate. If a state of facts existed in which the magistrate was bound to issue a summons, but did not do so, the Insurance Commissioners were entitled to come to this Court for a rule or mandamus to compel the magistrate to do his duty, and we should have granted it. We have no idea, because an Act of Parliament may be unpopular, of permitting it to be in the discretion of the magistrates whether it is to be carried out or not.

In the present case Mr. MacLaughlin's letter enclosing the summons is practically equivalent to a statement such as I have mentioned as being sufficient to have justified the magistrate in issuing a summons. In substance he states that he is acting for the Insurance Commissioners ; in substance he states that the money is due, and asks for a summons to issue ; and I am of opinion that unless the magistrate disbelieved, or had reasonable grounds to doubt, that statement, it was his duty to have issued the summons. Mr. Boyd accordingly did his duty and signed this summons, and the fact of Mr. Trench being brought before

the Court by this summons, not only gave the Court jurisdiction *K. B. Div.*
to hear the case, but made it their duty to hear it. 1913.

I think that we should never have heard of this question but
that this gentleman, and perhaps the magistrates, thought this an
unpopular Act of Parliament.

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Palles, C.B.

We must declare that the magistrates were wrong in point of
law in their determination, and send the case back to them with a
direction to proceed according to law.

KENNY, J., concurred.

Solicitor for the appellants: *J. F. Culhane.*

Solicitor for the respondents: *J. E. Proctor.*

J. G. T.

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Oct. 27.

THE KING (SHEEHAN) v. JUSTICES OF THE COUNTY OF WATERFORD (1).

Justices—Summary conviction—Certiorari—Omission in summons—Defect cured—County Officers and Courts (Ireland) Act, 1877 (40 & 41 Vict. c. 56), s. 76—Statute—Construction—How far word “wilfully” governs subsequent words—Fisheries (Ireland) Act, 1842 (5 & 6 Vict. c. 106), s. 74.

By s. 74 of the Fisheries (Ireland) Act, 1842, it is enacted that if any person shall wilfully take, kill, destroy, expose to sale, or have in his possession any unclean salmon, he shall forfeit a sum not exceeding £2 for every such fish so taken, &c.

Held, that the word “wilfully” governs the words “have in his possession,” and that a conviction on a summons charging the defendant with having in his possession unclean salmon, but omitting the word “wilfully,” was bad.

But *held*, that as it appeared that the justices had in fact determined on the hearing of the summons that the defendant had the salmon wilfully in his possession, and the Court being of opinion that the omission of the word “wilfully” from the summons did not mislead or prejudice the defendant or affect the merits of the case, the Court, in obedience to s. 76 of 40 & 41 Vict. c. 56, would refuse, on certiorari, to quash the conviction.

The King (U. D. C. Athy) v. Justices of Kildare ([1912] 2 I. R. 64), and *The King (Johnston) v. Justices of Belfast* (*post*, p. 181, note), applied.

CERTIORARI.

The prosecutor herein was defendant in two summonses in which the conservators, Waterford District, by J. H. Jones, were complainants. One of these summonses was as follows:—
“Whereas a complaint has been made to me that you the defendant did at Dungarvan, in the county of Waterford, on the 25th day of February, 1913, have in your possession two unclean salmon contrary to the statute in such case made and provided (2), This is to command you,” &c.

(1) Before PALLES, C.B., and BOYD and KENNY, JJ.

(2) Fisheries (Ireland) Act, 1842 (5 & 6 Vict. c. 106) s. 74:—“And be it enacted that if any person shall at any time wilfully take, kill, destroy, expose to sale, or have in his possession any red, black, foul, unclean, or unseasonable salmon or trout, such person shall forfeit and pay any sum not

The other summons was in a similar form, except that the date mentioned was the 26th February, 1913.

The summonses were heard before the justices at petty sessions, and the defendant was convicted on both charges. The convictions in each case set out the complaint as in the summons, and ordered as follows:—"Defendant is convicted of the said offence and ordered to pay for fine the sum of £1 and for costs the sum of 1s. 6d. forthwith, and in default of payment," &c.

The prosecutor herein obtained a conditional order for a writ of certiorari to quash each of the convictions on the ground (*inter alia*) that it was bad on its face, as the word "wilfully" was omitted therefrom.

From an affidavit made by the solicitor for the complainants in the summonses, and filed by way of showing cause against making the conditional order absolute, it appeared that at the hearing evidence was given that on the respective dates in question the defendant had in his possession unclean salmon. The affidavit further stated:—"Mr. Ryan [the defendant's solicitor] raised the question that on the evidence the magistrates could not find that Mr. Sheehan wilfully had in his possession unclean salmon on either of the days mentioned in the summons. The magistrates concluded on the evidence that he was guilty of the offence of wilfully having unclean salmon in his possession, and he was accordingly fined £1 in each case. Through inadvertence, however, the word 'wilfully' was omitted from the conviction when the books were being made up."

The present application was on behalf of the prosecutor to make the conditional order absolute notwithstanding cause.

Lupton, for the prosecutor:—

The word "wilfully" in sect. 74 of 5 & 6 Vict. c. 106, governs the words "have in his possession." A person might buy an unclean salmon without knowing it to be unclean, and it could never have

exceeding two pounds for every such fish so taken, killed, destroyed, exposed to sale, or in his possession: Provided always, that if any person shall take or catch any such fish accidentally, and return the same immediately to the water without injury, such person shall not be liable to the penalty aforesaid."

K. B. Div. 1913. REX (SHEEHAN) v. JUSTICES OF WATERFORD. been intended that such person should be guilty of an offence. The omission of the word "wilfully" renders the convictions bad : *Carpenter v. Mason* (1). The defect is not one which is cured by sect. 76 of 41 & 42 Vict. c. 56, since the word "wilfully" is of the very essence of the offence, and its omission must necessarily mislead and prejudice the defendant and affect the merits of the case. On this ground the present case is distinguishable from *The King (U. D. C. Athy) v. Justices of Kildare* (2).

Sealy (with him *Serjeant Matheson, K.C.*, and *Conner, K.C.*), for the conservators :—

The word "wilfully," in sect. 74 of 5 & 6 Vict. c. 106, governs only the words immediately following, and not the words "have in his possession." The proviso at the end of the section shows that the word "wilfully" applies only to the taking or catching of the fish, and this construction is borne out by a consideration of the corresponding section of the English Act, 24 & 25 Vict. c. 109, sect. 14. But, even assuming that the word "wilfully" governs the words "have in his possession," the omission of the word is a defect which is cured by sect. 76 of 40 & 41 Vict. c. 56, and a writ of certiorari should not be granted: *The King (U. D. C. Athy) v. Justices of Kildare* (2). [Palles, C.B., referred to the case of *The King (Johnston) v. Justices of Belfast* (3).]

Lupton, in reply.

Oct. 27.

PALLES, C.B.:—

We are all of opinion that the words "have in his possession" in sect. 74 of 5 & 6 Vict. c. 106, are governed by the word "wilfully," and that, therefore, the summons was wrong and the conviction wrong.

This brings us to sect. 76 of 40 & 41 Vict. c. 56, and the present case is as plainly within that section as any case could be. *The King (Johnston) v. Justices of Belfast* (3) goes a great deal further than this case. It was admitted that the defendant had

(1) 12 A. & E. 629.

(2) [1912] 2 I. R. 64.

(3) See *post*, p. 181, note.

the salmon in his possession, and the sole question was whether the having in his possession was or was not wilful. K. B. Div.
1913.

We will make an order in the same form as in *Johnston's Case* (infra), refusing to grant the certiorari, but we will give no costs. REX
(SHEEHAN)
v.
JUSTICES OF
WATERFORD.

The Court made the following order:—

The Court doth declare that the justices in fact determined, upon the hearing of the two several summonses in said conditional order referred to, that the defendant in such summonses did wilfully have in his possession unclean salmon at the times therein mentioned, and the Court being of opinion and declaring that the omission of the word "wilfully" from said summons did not mislead or prejudice the defendant in the said summons, or affect the merits of the case, doth, in obedience to sect. 76 of the Act 40 & 41 Vict. c. 56, refuse to quash the said convictions by reason of such omission, and accordingly doth order that the cause shown be allowed, and that the said conditional order be and the same is hereby discharged without costs.

Solicitor for the prosecutor: *E. Arthur Ryan*.

Solicitor for the Waterford Conservators: *John F. Williams*.

J. G. T.

NOTE.

KING'S BENCH DIVISION, 1912, November, 18, 25.

Before PALLIS, C.B., and GIBSON and BOYD, JJ.

REX
(JOHNSTON)
v.
JUSTICES OF
BELFAST.

THE KING (JOHNSTON) v. THE JUSTICES OF THE COUNTY OF
THE CITY OF BELFAST.

Justices—Summary conviction—Certiorari—Omission in summons—Defect cured—Charge of using room for public dancing—Omission of statement room "ordinarily so used"—Omission of statement that defendant was occupier—Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 51—County Officers and Courts (Ireland) Act, 1877 (40 & 41 Vict. c. 56), s. 76.

CERTIORARI.

The prosecutor herein was defendant in a summons in which the Corporation of Belfast were complainants. The summons set out as follows:—

"Whereas a complaint has been made to me that you did on the 10th day of March, 1912, at 23 York Street, in said city [Belfast], use a room for public dancing without a licence for the purpose for which the same was used first

K. B. Div. obtained from the licensing justices of the licensing district in which the said room is situate, contrary to the statute. This is to command you," &c.

1912. — The summons was brought under s. 51 of the Public Health Acts Amend-
REX ment Act, 1890 (53 & 54 Vict. c. 59), which enacts as follows:—
(JOHNSTON
v.

JUSTICES OF "For the regulation of places ordinarily used for public dancing or music
BELFAST. or other public entertainment of the like kind, the following provisions shall have effect (namely):—

"1. After the expiration of six months from the adoption of this part of the Act a house, room, garden, or other place shall not be kept or used for public dancing, singing, music, or other public entertainment of the like kind, without a licence for the purpose or purposes for which the same respectively is to be used first obtained from the licensing justices of the licensing district in which the house, room, garden, or place is situate. . . .

"5. Any house, room, garden, or place kept or used for any of the purposes aforesaid without such licence first obtained shall be deemed a disorderly house, and the person occupying or rated as occupier of the same shall be liable to a penalty not exceeding £5 for every day on which the same is kept or used for any of the purposes last aforesaid."

The summons was heard before the justices at petty sessions, and the defendant was convicted. The conviction set out the complaint as in the summons, and ordered as follows:—"Defendant is hereby convicted of the said offence, and ordered to pay for fine the sum of £4 and for costs the sum of 2s. forthwith, and in default of payment to be imprisoned," &c.

The prosecutor herein obtained a conditional order for a writ of certiorari to quash the conviction on the grounds (*inter alia*)—(a) That the summons and order were both bad, because it was not alleged therein that the defendant was the person occupying or rated as occupier of the premises. (b) Because it was not alleged in the summons or order that the premises were ordinarily used for public dancing.

In affidavits made by the justices and filed by way of showing cause against the conditional order, it was stated that on the hearing of the summons the defendant's solicitor specifically stated that the defendant before the Court was not the tenant of the premises, nor had he occupied them, nor was he rated as occupier. That this was the main question in dispute, and that the justices came to the conclusion, on the evidence, that the defendant was the real person occupying the premises. That the defendant's solicitor also took objection to the form of the summons, in that it did not state that the premises were ordinarily used for public dancing, and that the justices decided as a matter of fact that the said premises were ordinarily used for public dancing.

Bartley for the prosecutor.

Thomas Harrison for the justices.

The Court made the following order :—

The Court doth declare that the justices in fact determined upon the hearing of the summons in the conditional order referred to—(1) that the defendant in such summons was the occupier of the premises in said summons mentioned at the time of the user in such summons complained of, and (2) that the said premises were at said time ordinarily used for public dancing; and the Court being of opinion and declaring that the omission to state in the said summons that the defendant was such occupier, and that the said premises were so ordinarily used for public dancing, did not mislead or prejudice the defendant in the said summons, or affect the merits of the case, doth, in obedience to sect. 76 of the Act (40 & 41 Vict. c. 56), refuse to quash the said conviction by reason of such omission, and accordingly doth order that the cause shown be allowed, and that the said conditional order be and the same is hereby discharged without costs.

Solicitor for the prosecutor : *P. J. Magee.*

Solicitor for the justices : *A. J. Lewis.*

J. G. T.

K. B. Div.

1912.

REX
(JOHNSTON)
v.
JUSTICES OF
BELFAST.

MORROW v. MORROW (1).

(1913. No. 7145.)

K. B. Div.

1914.

April 27.

Criminal conversation—Evidence—Testimony of plaintiff's wife—Sole evidence against adulterer—Corroboration.

There is no rule of law precluding a jury in an action for criminal conversation from acting on the uncorroborated evidence of the plaintiff's wife as to acts of adultery committed with the defendant.

NEW TRIAL MOTION.

The action, which was one for criminal conversation, was tried before Mr. Justice Kenny and a common jury at the Assizes for the county of Donegal, held at Lifford on March 16th, 1914.

The evidence of the plaintiff, so far as material for the purposes of the present report, was to the following effect :—

He was married in 1899, and there were issue of the marriage six children, the eldest of whom was twelve and a-half years of

(1) Before CHERKY, L.C.J., and DODD, J.

K. B. Div. age. He and his wife lived together on terms of affection, and
1914. on May 25th, 1912, he, with the approval of his wife, emigrated
MORROW to the United States, and thence to Canada. He returned to
v. Ireland, on March 10th, 1913, and on May 21st, 1913, his wife
MORROW. was delivered of a child. While the plaintiff was abroad, he
sent his wife money, and he and she kept up an affectionate
correspondence. On his return home, he questioned his wife
about her condition, and she told him she was in the family way
to the defendant. Next day the plaintiff put out his wife, but as
she was absolutely penniless, and had no place to go to, he brought
her back the same day. On the 12th March the plaintiff saw
the defendant, who was with his father; but he said nothing to
him about what he had been told by his wife. On March 25th,
having found the defendant alone, he told him he had a very
serious charge to make against him. The defendant "said he had
nothing to say to her. I asked him to come to the house and
prove his innocence; he refused, and said he would run away and
take the law of me. for taking away his character. He was
avoiding me all this time."

Catherine Morrow, the plaintiff's wife, was examined as a
witness for the plaintiff, and gave evidence as to improper
intercourse having taken place between the defendant and herself
in the month of August, 1912, at her house. She stated that
she and her husband were at present living together as man and
wife.

This closed the plaintiff's case; and counsel for the defendant
asked for a direction, on the ground that there was no corroboration
of the wife's evidence, and that the plaintiff was not entitled to
damages, or, at most, only to nominal damages, as he had condoned
the adultery. The learned Judge refused to direct.

The defendant in his evidence denied that he had been in the
house of plaintiff's wife during July or August, or had ever
had any improper intercourse with her. He was on intimate
terms with her; and in the winter time would call in when
passing.

The Rev. W. Chapman, the rector of the parish, gave evidence
of an interview he had had with the parties. The plaintiff's wife

repeated the charge against the defendant, and the latter denied that he had had any intercourse with her. K. B. Div.
1914.

At the close of the case counsel for the defendant repeated his requisition, and asked that a question should be put to the jury as to condonation. The learned Judge declined to do so, as he considered the circumstances constituting what was relied on as condonation were material only in the consideration of damages. The jury found for the plaintiff, with £50 damages, and judgment was accordingly given for the plaintiff. MORROW
v.
MORROW

The defendant now moved for a new trial or alternatively for judgment, on the grounds—(1) that the verdict was against the weight of evidence; (2) that the learned Judge was wrong in not directing a verdict for the defendant on the ground that the evidence of adultery given by the wife was not corroborated; (3) that the learned Judge was wrong in not directing the jury that the plaintiff was entitled to no damages, or at most to nominal damages only, on the ground that the plaintiff had with full knowledge condoned the adultery of his wife.

MacLoone, K.C. (with him, *T. J. D. Atkinson*), for the defendant:—

We submit that, in the absence of corroboration of the wife's evidence, the learned Judge should have directed a verdict for the defendant. The Divorce Act, 1857 (20 & 21 Vict. c. 85), s. 33, which regulates the law in England, provides that petitions for dissolution of marriage, or for judicial separation, or claiming damages from an adulterer, shall be heard and tried on the same principles, in the same manner, and subject to the same or like rules and regulations "as actions for criminal conversation are now tried and decided in courts of Common Law." Therefore the rules of evidence which apply in England to a claim for damages against a co-respondent, apply in Ireland to actions for criminal conversation. Although, as between husband and wife, the Courts in England will, on the admission or confession of the wife, grant a dissolution of marriage, they dismiss petitions for damages against a co-respondent unless the evidence of the petitioner's wife is corroborated: *Taylor on Evidence*,

K. B. Div. 10th ed., pars. 768-9: *Robinson v. Robinson* (1), at page 392; 1914. *Jinkings v. Jinkings* (2); *Crawford v. Crawford* (3): Brown and Watts on Divorce, 8th edition, 255.

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v.
MORROW.

The rule of the Ecclesiastical Courts was, that a separation should not be granted on the unsupported testimony of the parties themselves, "howsoever taken upon oath, either within or without the Court": Irish Canons of 1634, No. 53, *Kisbey's Matrimonial Law*, p. 24. The same rule should be applied here as in the case of an accomplice in a criminal trial. Although it has been said not to be a rule of law that the evidence of an accomplice must be corroborated, it is now fully recognized to be an established practice, virtually equivalent to a rule of law, to require corroboration of the evidence of an accomplice by independent evidence in some material particular, going to the offence itself, and implicating the accused: *Archbold, Crim. Pl.*, 24th ed., p. 456; *Rex v. Tate* (4). In cases under the Bastardy Act, the evidence of the mother must be corroborated in some material particular by other testimony: 8 Vict. c. 10, s. 6. We contend that the learned Judge should have told the jury that they ought not to act on the uncorroborated evidence of the plaintiff's wife. We admit that the objection on the ground of condonation is not sustainable.

Lipsett, for the plaintiff:—

No objection to the charge of the learned Judge was taken at the trial, and it is not now open to the defendant to make such an objection. There is no rule of law or of practice that, in an action claiming damages against an adulterer, there should be corroboration of the evidence of the plaintiff's wife: *Phipson on Evidence*, 5th ed., pp. 481, 483; *Getty v. Getty* (5); *Curtis v. Curtis* (6); *Weinberg v. Weinberg* (7). The Court is bound to act on any evidence legally admissible by which the fact of adultery is established: *Robinson v. Robinson* (1), at page 393.

(1) 1 Sw. & T. 362.

(2) 1 P. & M. 330.

(3) 11 P. D. 150.

(4) [1908] 2 K. B. 680.

(5) [1907] P. 334.

(6) 21 T. L. R. 676.

(7) 27 T. L. R. 9.

Even if corroboration were necessary, there was some evidence of corroboration on a number of points.

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MORROW
v.
MORROW.

Atkinson, in reply.

CHERRY, L.C.J.:—

This is a case of some importance. It raises interesting questions of law, and it has been argued with great ability on both sides.

The action is brought by the plaintiff to recover damages for criminal conversation with his wife. On the 25th May, 1912, the plaintiff went to America, leaving his wife behind him, and remained there till the 10th March, 1913. When he came home he found to his dismay that his wife had not been faithful to him, and on the 21st May a child was born of whom he could not have been the father. In these circumstances he brings the action, and names the defendant, a first cousin of his, as the adulterer. The wife confesses the adultery; and practically the only evidence at the trial against the defendant was that given by the plaintiff's wife.

We are asked to set aside the verdict found and judgment entered for the plaintiff, on the grounds that, in the first place, the verdict was against the weight of evidence; and, in the second place, on the ground that there was no corroboration of the wife's story. By the notice of motion we are asked, in the third place, to say that there was condonation of the wife's action by the defendant. On these grounds it was argued that the learned Judge at the trial ought to have directed a verdict for the defendant.

As regards the first point, it is clearly established that in order to set aside a verdict as against the weight of evidence it is not sufficient to show to the satisfaction of the Court that the verdict of the jury was wrong. It is necessary to go further and establish that the verdict was so inconsistent with the facts that, in the opinion of the Court, no reasonable jury could have arrived at such a finding. I do not think that, in this case, we can say that no reasonable jury could have returned the verdict arrived at,

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even though we may not agree with it. We cannot possibly hold that the verdict was so unreasonable that it ought not to be allowed to stand.

On the second point, I cannot find that any Court has ever laid down as a rule of law that in an action for criminal conversation corroboration of the wife's evidence is necessary. It is most unusual to examine the wife as a witness to prove her own guilt; and the cases cited by Mr. MacLoone are authorities only for the proposition that the confession of the wife to the husband, or a third party, is not evidence as against the adulterer, it being merely hearsay as against him, and upon that ground not admissible at all. It is clearly established by *Robinson v. Robinson* (1) that in proceedings for divorce the admissions or confessions of the respondent are not admissible evidence against the co-respondent. That is a question of the admissibility of evidence, and not a question of corroboration. The same case decides that in a suit for the dissolution of a marriage the Court may act on the confession of the wife alone. Cockburn, C.J., puts that very strongly at page 393. "Now" (he says) "the evidence, as has been before observed, consists entirely of admissions made by the wife herself; and here a question presents itself as to how far admissions of a wife charged with adultery, unsupported by any confirmatory proof, can be acted upon as conclusive evidence on which to pronounce a divorce. If this Court had been a Court of purely ecclesiastical jurisdiction, the 105th canon, which prohibits the granting of a divorce on the sole and unsupported testimony of the wife, would have precluded us from acting on this evidence. But, as this Court is not a Court of ecclesiastical jurisdiction, nor bound in cases of divorce *à vinculo* by rules of merely ecclesiastical authority, it is at liberty to act, and bound to act, on any evidence legally admissible by which the fact of adultery is established; and if, therefore, there is evidence, not open to exception, of admissions of adultery by the principal respondent, it would be the duty of the Court to act on such admissions, although there might be a total absence of all other evidence to support them." But this is not an Ecclesiastical Court any more than the Divorce

(1) 1 Sw. & T. 362.

Court; and a Judge and jury are bound to act on any evidence legally admissible from which the fact of adultery can be established. Here we have such evidence, and I see no reason for setting aside the verdict on the ground that there was no corroboration. Mr. MacLoone further argued that the Judge, even though he did not direct a verdict for the defendant, ought to have told the jury that it would be dangerous for them to act on the evidence of the wife alone. I do not think that this ground of objection is now open, as no exception was taken to the Judge's charge at the time. For all we know he may have told them so; but, even if he did not do so, we do not think that that would be any ground for setting aside the verdict.

The third objection need not be considered, as it has been expressly withdrawn by counsel for the defendant.

On the whole case I am satisfied that the judgment of Mr. Justice Kenny was right, and that it ought not to be set aside.

DODD, J.: I concur, and for the reasons stated.

Solicitor for the plaintiff: *J. Dunlevy.*

Solicitor for the defendant: *J. H. Magee.*

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THE KING v. ROBERT SMITH (1).

Jan. 27, 28. *Criminal law—Statute of Northampton* (2 Edw. 3, c. 3)—“*Riding or going armed*”—*Form of indictment under the statute—Necessity to negative lawful occasion and to aver “in terrorem populi”—Charge of acting so as to be a nuisance to and to alarm public lawfully using the public road—Evidence—No person on road.*

An indictment for riding or going armed against the form of the Statute of Northampton (3 Edw. 3, c. 3), which omits to negative lawful occasion, is bad, as omitting an essential ingredient of the offence, and will not be cured by verdict.

Counts in an indictment charging that the accused went about on a public road without lawful occasion, in such a manner as to be a nuisance to, and to alarm the public lawfully using the road, and charging that the accused on the public road unlawfully discharged a revolver to the great danger of the public, even assuming that the omission of the words “lawfully using the highway” does not make the latter count bad, cannot be sustained where it appears that none of the public were present or capable of being alarmed or endangered.

Quære :—Whether the omission of the averment that the acts were done *in terrorem populi* would be aided or cured by verdict?

CASE RESERVED by the Right Hon. Mr. Justice Gibson from the Ulster Winter Assizes, 1913.

The case set out as follows :—

“1. The accused was tried before me at the above assizes on an indictment containing three counts, the first under the Statute of Northampton, 2 Edw. 3, c. 3, and the second and third at common law. The indictment is set out in the appendix hereto.

“*W. E. Wylie* and *G. Dougherty*, counsel for the Crown.

“*T. W. Brown*, counsel for the accused.

“2. The facts were as follows :—

“Mr. James Wilson, the owner of a scutch-mill in county Derry, situate about 15 yards from the public high road, on Saturday, 1st November, 1913, shortly after one o'clock, heard a shot outside,

(1) Before PALLES, C.B., GIBSON, MADDEN, BOYD, DODD, and MOLONY, JJ.

and thereupon, going to the door, saw the prisoner, who, standing on the public high road, raised his hand and fired a revolver at Wilson, or in his direction, as he stood at the door 15 yards from the public road. Wilson heard the bullet whistle past, at a distance, he thought, of 12 or 16 inches from him. He turned back into the mill where his staff were at work. Immediately the accused came into the mill by the back door. Being ordered off the premises, he pulled his revolver out of his pocket and said, 'Come on now.' Wilson took up a gaip and sent for the police. The accused went out on the county road, and took off his coat, challenging Wilson to come out and fight. The only use of the revolver was on the first occasion.

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"3. There was no one on or near the high road at the time, within sight. The only person who witnessed the shot, or could have been affected by it, in bodily senses, mind, or nerves, was Wilson.

"4. There was also an indictment for firing at Wilson with felonious intent, but this was not proceeded with.

"5. The defence was the false one that the accused had no revolver, fired no shot, and that Wilson's story was untrue. The jury convicted, it being clear that the accused did use the revolver as described.

"6. Before the accused was sentenced, it occurred to me, on consideration, that, assuming all the counts disclosed valid indictable misdemeanours, it was doubtful whether the evidence supported such counts. The general law stated in Stephen's Digest, ed. 1883, p. 48, and in Archbold, last ed., p. 1224, appeared to me to relate to offences in the nature of nuisance to the public using the highway, and not to use of the highway (when no one was travelling or could be inconvenienced) as a standing ground for shooting at a person at a distance from the highway. The case of *R. v. Meade* (1) seemed distinguishable, as the offence there was committed in a street then traversed by the public. Whether the case be distinguishable or not, I was inclined to think that the Statute of Edw. 3 contemplated something in the nature of an affray or danger to peace in a public place, and

(1) 19 T. L. R. 540.

Cr. Cas. Res. could hardly be made to apply to such facts as above stated.

1914. In any event, it appeared desirable that, if this old statute was
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v.
SMITH. considered and settled by an authoritative decision.

"The question for the consideration and determination of the Court is whether there was evidence to support all, or some, and if so, which, of the counts in the indictment; and whether the said counts are respectively good in law. If any count is good in substance and form and supported by evidence, the conviction on that count is to be affirmed; and if all the counts are good and supported by the evidence, the conviction on all is to be so affirmed. If none of the counts is supported by evidence, or if none of the counts is good in law, the conviction is to be reversed.

"I sentenced the prisoner on each count to three calendar months' imprisonment, to run concurrently, my sentence being based on the crime charged in the indictment, much less grave than what might have been the subject of prosecution. I ordered that he should also give bail to keep the peace and be of good behaviour for two years, and in default that he be imprisoned for a further period of six calendar months, or until he gave such bail sooner; and I ordered that if the conviction was reversed he should give bail, within ten days from such reversal, to keep the peace and be of good behaviour for two years, and in default of such bail that he be imprisoned for six calendar months from the date of such reversal, or until he give such bail sooner; and I ordered that such bail respectively should be perfected before the nearest resident magistrate in county Derry, after due notice to the police officer of the district.

"I respite execution until the question of law was decided, the accused to give bail, himself in £20 and one sufficient surety in £10, to surrender and deliver himself up to suffer the above sentence to the gaoler of Londonderry prison, within ten days from such decision affirming the conviction on all or any of the counts.

"Such bail was duly given, and the prisoner discharged.

J. G. GIBSON."

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APPENDIX.

COUNTY OF LONDONDERRY. } The jurors for our Lord the King
 To Wit. } upon their oath present that Robert
 Smith on the First day of November, in the year of our Lord
 One Thousand Nine Hundred and Thirteen, did go about on the
 public road at Ballyagan in the county aforesaid armed, the said
 Robert Smith not being one of the King's servants or ministers,
 against the form of the statute in such case made and provided,
 and against the peace of our Lord the King, his crown and
 dignity.

And the jurors aforesaid upon their oath aforesaid do further
 present that the said Robert Smith on the day and year aforesaid
 did go about on the said public road armed in public without
 lawful occasion, in such a manner as to be a nuisance to and to
 alarm the public lawfully using the said road against the peace of
 our Lord the King, his crown and dignity.

And the jurors aforesaid, upon their oath aforesaid, do further
 present that the said Robert Smith on the day and year aforesaid
 on the public road aforesaid did unlawfully discharge a loaded
 revolver to the great danger of the public and against the peace
 of our Lord the King, his crown and dignity.

The material portion of the Statute of Northampton (2 Ed. 3,
 c. 3) is as follows:—

(Folio Edition of 1810.)

“Ensement acorde est & establi, q nul g^{ant} ne petit de quele
 condicion qil soit, sauve les sjantz le Roi en la psence le Roi, & les
 ministres le Roi, enfesantz execucion des mandementz le Roi, ou
 de lour office, et ceux qi sont en lour compagnies, eidantz as ditz
 ministres, et auxint au cri de fait darmes de pees, & ce en lieux ou
 tielh faitz se ferront, soit si hardi de venir devant les Justices le Roi,
 ou autres Ministres le Roi enfesant lour office a force & armes, ne
 force mesner en affrai de la pees, ne de chivaucher ne daler arme,
 ne de nuit ne de jour, en faires, marchees, nen psence de Justices,
 ne dautres Ministres, ne nule part aillours, sur peine de perdre lour

Cr. Cas. Res., armures au Roi & de leur corps a la prisone a la volunte de Roi.”

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Thus translated :—

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“ Item it is enacted, That no Man great nor small, of what condition soever he be, except the King's Servants in His presence, and His Ministers in executing of the King's precepts, or of their Office, and such as be in their Company assisting them, and also [upon a Cry made for Arms to keep the Peace, and the same in such places where such acts happen,] (1) be so hardy to come before the King's Justices or other Ministers doing their office, with force and arms, nor bring no force in affray of the peace nor to go nor ride armed, by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere, upon pain to forfeit their armour to the King and their Bodies to Prison at the King's Pleasure.”

T. W. Brown, for Smith :—

The evidence is clearly evidence of shooting with intent ; but that charge was dropped, and the Crown has deliberately proceeded upon three counts charging Smith with an offence of a public nature. The first of these counts is laid under the Statute of Northampton (2 Ed. 3, c. 3), a statute primarily aimed at affrays. The enactment, in its historical occurrence, follows the turbulent times of Edward II, and was aimed at the mischief which arose at that disturbed period. The enactment opens with the offence of interfering with the King's Justices or Ministers, and then deals with the prohibition of going or riding armed “ in fairs, markets,” or “ in no part elsewhere.” These latter words are the only words under which this indictment can be laid, and to them

(1) In the 1810 Folio Edition of the Statutes a variant reading is here given, i.e. :—“ Upon a Proclamation of Deeds of Arms in time of Peace, and that in places where such Deeds are to be done,” which reading is supported by a quotation of a writ, reciting a Grant of Richard I. (from the Lib. Rub. of the Exchequer, folio 122*b*), “ Quod torneamenta sint in Anglia in V. placias. Inter Sarr. et Wilton : inter Warrewich et Kenelingworth ; inter Stanford et Warneford : inter Brakele et Minebr. ; inter Blie et Tykehiffe. Ita quod pax terrae nostrae non infringetur, nec potestas Justiciaria minorabitur nec de forestis nostris dampnum inferetur.” [REP.]

the Crown seeks to give the widest significance, as enacting that no person other than the King's servants or ministers can go armed in any place at any time. The Statute of Northampton was re-enacted by the 7 Rich. 2, c. 13, and 20 Rich. 2, c. 1; the latter statute added the penalty of a fine. The former of these statutes was repealed in 1857, and the latter in 1863 in England, and in 1872 in Ireland.

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In Stephen's Criminal Law (ed. 1904), p. 54, and in Archbold's Criminal Pleading, the Statute of Northampton is treated as dealing with affrays. In Archbold (24th ed., p. 1224), after dealing with affrays, this statute is mentioned, and a form of indictment for affray is given. Hawkins, in his Pleas of the Crown (8th ed., p. 489, par. 9), deals with the statute under the title "Affrays," and as one of the points holden upon the statute states that no wearing of arms is within it except it be a wearing of arms under circumstances "apt to terrify the people." Russell on Crimes, 7th ed., vol. i, p. 428, treats of the statute under the title "Riots," and, while quoting *R. v. Meade* (1), relies upon the interpretation of Hawkins. In Nun and Walsh (2), Justice of the Peace, it is stated that it has been always understood that the statute was intended to prevent the wearing of arms or the appearing with them under such circumstances as might naturally excite terror. Hayes, in his Criminal Law, has no reference to the statute whatsoever. [Dodd, J.: "Hayes, however, deals with the drastic code under the Whiteboy Acts; those statutes and the Statute of Northampton would overlap."]

In Coke's Third Institute, at pp. 159-162, the statute is dealt with, and Coke appears to treat "nor in no part elsewhere" as referable to places *ejusdem generis* with "fairs, markets, &c." Fitzherbert, in his Natura Brevium, under the letter F, gives a form of writ for forcible entry under the statute, and the recital in the writ shows that Fitzherbert interpreted the statute as aimed at unlawful assemblies. In *Chune v. Piott* (3), an action for false imprisonment, the statute was cited as dealing with the carrying of weapons on the highway *in terrorem populi*. The gist of the offence in

(1) 19 T. L. R., 540.

(3) 2 Bulst. 328, at p. 330.

(2) 1844 ed., p. 151.

Cr. Cas. Res. that case was interference with the King's minister. In *Sir John Knight's Case* (1) the Chief Justice read the statute as forbidding going armed to "terrify the King's subjects." In *R. v. Meade* (2), upon which the Crown relies, an indictment similar to that in this case was presented, and Wills, J., held that firing a loaded firearm, so as to terrify the public, was an offence at Common Law. But there the accused, Meade, deliberately bought the revolver for the purpose of firing it to wound or alarm his brother, with whom he had quarrelled. Here there is no evidence that Smith quarrelled with Wilson, or bought the revolver for the purpose of terrifying Wilson. [Palles, C.B.: "But the private intention of the accused would not be material if the offence is to be laid as *in terrorem populi*."] *1914.*
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The carrying of arms was recognized by the Bill of Rights, 1 W. & M. c. 1; and in Gabbett's Criminal Law a statute of 11 Geo. 4, & 1 Wm. 4, c. 44, is mentioned, which dealt with the importing of arms, but which recognizes the right to have arms for personal defence. The going or riding armed under the Statute of Northampton is a going or riding armed *in terrorem populi*, and in a place *ejusdem generis* with the places specified in the statute. If two men were playing at dice, and, on a sudden quarrel, drew their swords, that would not have been an offence under the statute. The indictment should have alleged the act to have been done *in terrorem populi*; it does not so allege, and it is bad. Even if it did, there is here no evidence to support that averment. Further, the indictment only excepts the being one of the King's servants or ministers, but the statute excepts "auxint au cri de fait darmes," and that should have been excepted in the pleading.

On the second count the evidence is insufficient. There is no proof of any of the public using the road. There is no proof of nuisance or alarm to any of the public. As stated in the case, the only person who could be affected by Smith's action with the revolver was Wilson. He was not on the road, nor using the road, as averred; and if he were, on the analogy of the cases

(1) 3 Mod. 117.

(2) 19 T. L. R., 540.

of indecent exposure it would not be sufficient proof to sustain *Cr. Cas. Res.*
the count: *R. v. Webb* (1); *R. v. Farrell* (2). 1914.

The third count charges an offence punishable summarily:
Summary Jurisdiction (Ireland) Act, 1851, 14 & 15 Vict. c. 92, Rex
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sect. 10, sub-s. 2.

No doubt the old rule as to the strict construction of penal statutes is not now so rigorously applied; but here, where there was an indictment for shooting with intent, which was deliberately abandoned in order to try the case under the statute, the indictment should be strictly parsed. It must be strictly within the statute, and technical defects in the form should weigh against the Crown.

The Attorney-General (Moriarty, K.C.) and W. E. Wylie
(with them, *Gerald Dougherty*), for the Crown:—

In this case the Crown deliberately put the Statute of Northampton in force. The object of the prosecution in this form was to demonstrate that persons could not go about armed without incurring liabilities; that going armed was an offence for which they could be made amenable under that statute, as was decided, as lately as 1903, by a Judge of great eminence, Wills, J., in *R. v. Meade* (3). Here it is clear that Smith was upon the highway armed with a revolver, a dangerous and offensive weapon, which it was not, and could not be, contended he had for any lawful purpose. After discharging the revolver on the road, he again produced it in Wilson's mill. The facts, the actions of the accused, are clearly within the mischief against which the statute was enacted.

The scope and meaning of the Statute of Northampton can be best illustrated by a review of the comments on and readings of that statute contained in the works of text-writers, and in the authorities from the time when the statute was passed, 1328, to the present time. The first writer to comment upon it was the famous author of the "*Natura Brevium*," well styled "an exact work, exquisitely penned," Fitzherbert, who was a Judge in the

(1) 1 Den. 338.

(2) 9 Cox, 446.

(3) 19 T. L. R. 540.

Cr. Cas. Res. reign of Henry VII. The passage cited by Mr. Brown from the 1914. "Natura Brevium" does not by its context bear out the construction put on it by him, that Fitzherbert's opinion was that there was no substantive offence under the statute, apart from an affray. Sir Edward Coke, in his Third Institute, chapter 73, at page 159, treats "going or riding armed" as a substantive offence, both by statute and at common law. He points out that the statute was primarily aimed at the knights errant, who rode about the country with offensive arms during the period of chivalry. He renders "pees" as "pais," and instead of the words of the statute "in no place elsewhere," reads "in any place whatsoever." That reading clearly negatives the construction that the "no place elsewhere" is to be read as referring to places *ejusdem generis* with "fairs, markets, &c."

Sir William Lambard (1536-1601), in his *Eirenarchia*, or Of the Office of the Justice of the Peace (edition 1619), at page 126, chapter 3, says, "Yet may an affray bee without word or blow given, as if a man shall show himself furnished with armour or weapons, which is not usually worne or borne, it will strike a feare into others that bee not armed as hee is; and, therefore, both the Statute of Northampton (2 Ed. 3, c. 3), made against the wearing of armour and weapon, and the writ thereupon grounded, do speake of the words *effray del pais* and *in terrorem populi*." In his work on the Office of the Constable (edition 1619), at page 13, Lambard on the statute has the following passage:—"Againe, if anie person whatsoever (except the King's servants and ministers in his presence or in executing his precepts or other offices, or such as shall assist them; and except it be upon a Huy and Cry made to keep the peace, and that in places where acts against the peace do happen) shall be so bold as to go or ride armed by night or by day in Fayres Markets, or anie other places; then anie constable or anie other of the said officers may take such armour from him, for the King's use, and may also commit him to the gaole, and thereupon it shall be good in this behalf, for these officers to stay and arrest all such persons as they shall find to carry Daggs or Pistols, or to be apparelled with privie coats or doublets as by the proclamation (made in the 21st yeare of the reigne of the late Queen

Eliz.) they are specially commaunded." These passages, it is submitted, indicate the opinion that the offence arises under the statute where persons not among the excepted classes, or not upon a cry of arms, go or ride armed—the very fact of their being so armed being, as Lambard points out, to bring terror upon others. Dalton in his Justice of the Peace (edition 1715), at page 37, chapter 9, under the title "Armour" deals with the offence under the statute as that of riding or going "offensively" armed "in affray of the King's people"; and he refers to the passage in Lambard's office of the Constable. In *Sir John Knight's Case* (1), in 3rd Modern Reports, which has been cited, Sir Edward Herbert, the Chief Justice, read the offence under the statute to be going armed so as to terrify the King's subjects; and Hawkins treats the carrying of arms *in terrorem populi* as an offence *contra formam statuti*. His definition that the acts of the offender must be such as are apt to terrify really fits the case of going armed under circumstances such as are in evidence here. It cannot be pretended that at the present day it is usual or necessary for a private person under the King's peace to wear arms or armour, either for personal ornament or for defence; and it being usual for persons to be unarmed, the presence of an armed man, particularly with such a dangerous weapon as is proved here, must be "apt to terrify" those with whom he comes in contact. It is quite sufficient in a riot that the actions of the persons accused of riot should have terrified one person; and it is submitted that proof, which was here given, that one person was in such a situation as to be affected in his bodily senses, mind, or nerves, by Smith's presence and action with the loaded revolver upon the public road, is sufficient proof of the offence under the statute. We accept the interpretation that there must be an element of terror or alarm to others in the action dealt with by the statute, but it is submitted that the statute aims at the being armed, or carrying arms, visibly, so as to terrify persons lawfully using the road, or upon their lawful occasions. [Madden, J.: "Do you suggest that it is necessary to prove user of the

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Cr. Cas. Res. weapon?"'] No. A man who without lawful occasion carries
 1914. a revolver, and exhibits it, would be within the statute. It would
 REX be difficult to suggest a lawful occasion for the carrying of a
 v. loaded revolver at the present day by a private person, protected
 SMITH. by the King's peace. Gabbett's Criminal Law (1835), vol. i, 63,
 treats the offence as that of being armed "with unusual weapons";
 and Sir James Stephen, in his Digest of Criminal Law (1904 ed.),
 at page 54, Article 73, defines it as the "going armed without
 lawful occasion, and in such a manner as to alarm the public."
 The authorities on the statute are concluded by the case of
R. v. Meade (1), where the indictment was similar to that here,
 and the accused was convicted under the statute. The indictment
 here is good. The ingredients of the offence, upon the
 authorities cited, carrying arms, unlawful occasion, and *in terrorem*
populi, are all contained in the first count. The indictment
 follows the words of the statute; it negatives the accused being
 one of the King's servants or ministers, and if the statute implies
 the act must be *in terrorem populi*, it is submitted that a count in
 the words of the statute is sufficient. It lay upon the accused
 to prove the lawful occasion. Further, the accused was tried,
 evidence of every necessary ingredient in the statutory misde-
 meanour was given, no demurrer to the count was taken, and the
 jury convicted; it is too late after verdict to object upon the
 form of the count, even if it be a bad count under the statute.
 The second count is a perfect count for an offence under the
 common law. It is not necessary to prove more than one person
 was terrified, or in a position to be terrified: *R. v. Hunt* (2);
Field v. Metropolitan Police (3). The words "using the road" are
 surplusage, and the evidence of the alarm to Wilson supports the
 count. The third count follows that in *R. v. Meade* (1). It is
 contended that it defines an offence punishable summarily; but
 the accused is indicted for nuisance, and the discharging of
 the firearm is additional, and is not of the essence of the
 offence.

(1) 19 T. L. R., 540.

(3) [1907] 2 K. B. 853, 859.

(2) 1 State Trials (N. S.), 171.

T. W. Brown, in reply :—

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The first count is bad. Going about armed is not *per se* an offence; the indictment should negative all the exceptions in the statute; it does not negative, for instance, that the accused was armed *au cri de fait d'armes*. The second count is peculiar in form; it expressly charges nuisance and alarm to the public "lawfully using the road," and that averment made should have been proved.

Cur. adv. vult.

The judgment of the Court was delivered by

PALLES, C.B. :—

Feb. 27

This case was reserved for us by my brother Gibson at the last Ulster Winter Assizes.

The indictment contained three counts. The first was framed on the Statute of Northampton (2 Edw. 3, c. 3), and averred that Robert Smith did go about on the public road at Ballyagan . . . armed, the said Robert Smith not being one the King's servants or ministers, against the form of the statute and against the peace.

The second count alleged that the said Robert Smith did go about on the said public road armed without lawful occasion in such a manner as to be a nuisance to and to alarm the public lawfully using the said road.

The third count stated that the said Robert Smith on the public road aforesaid unlawfully discharged a loaded revolver to the great danger of the public.

The evidence was as follows :—Mr. James Wilson, the owner of a scutch-mill in the county Derry, situate about 15 yards from the public high road, on Saturday, 1st November, 1913, shortly after one o'clock, heard a shot outside, and thereupon going to the door saw the prisoner, who, standing on the public road, raised his hand and fired a revolver at Wilson, or in his direction, as he stood at the door 15 yards from the public road. Wilson heard the bullet whistle past, at a distance, he thought, of 12 or 16 inches from him. He turned back into the mill where his staff was at work. Immediately the accused came into the mill

Cr. Cas Res. by the back door. Being ordered off the premises, he pulled his
 1914. revolver out of his pocket, and said, "Come on now." Wilson
 REX took up a graip, and sent for the police. The accused went out on
 v. the county road, and took off his coat, challenging Wilson to
 SMITH. come out and fight. The only use of the revolver was on the
 Palles, C.B. first occasion.

There was no one on or near the high road at the time within sight. The only person who witnessed the shot or could have been affected by it, in bodily senses, mind, or nerves, was Wilson.

There was also an indictment for firing at Wilson with felonious intent, but this was not proceeded with.

The defence was the false one that the accused had no revolver, fired no shot, and that Wilson's story was untrue. The jury convicted, it being clear that the accused did use the revolver as described.

The learned Judge sentenced the prisoner on each count to three calendar months' imprisonment, to run concurrently, and to give bail to keep the peace and be of good behaviour; and reserved for this Court the question whether there was evidence to support all, or some, and if so which, of the counts in the indictment, and whether the said counts were respectively good in law; and he ordered that if the conviction was reversed the prisoner should give bail to keep the peace and be of good behaviour for two years.

The Statute of Northampton (2 Edw. 3, c. 3) enacts that no man, great nor small, of what condition soever he be (except the King's servants in his presence and his ministers in executing of the King's precepts or of their office and such as be in their company assisting them), "*auxint au cri de fait darmes de pees & ce en lieux ou tielx faitz se ferront,*" be so hardy to come before the King's justices or other of the King's ministers doing their office, "*a force & armes ne force mesner en affrai de la pees . . . ne de chivaucher ne daler arme ne de nuit ne de jour en faires marcheés nen psence des justices ne dautres ministres ne nule part aillours,*" upon pain to forfeit their armour to the King and their bodies to prison at the King's pleasure.

"Armour" here means arms or gear, offensive or defensive, and "*affrai de la pees*" may mean a disturbance of the peace; and is so treated in some old writers. Lambard (Lambard's

Justice of the Peace, p. 170), for instance, in giving the form of a *Cr. Cas. Res.* return to a writ under the statute, states the going armed to 1914.
 have been *in perturbationem pacis, in terrorem populi*.
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The statute is unrepealed, and is undoubtedly in force; an indictment under it was sustained so late as 1903: *R. v. Meade* (1); *Palles, C.B.* but it is one on which there is but little judicial authority, although there is much in relation to it in text-books, to many of which, from Coke to Blackstone, we have been referred in the argument before us. From these it is clear that it deals with offences of two classes:—First, going before the King's justices or ministers doing their office with force and arms. There is nothing as to this offence in the present case. Secondly, bringing force in affray of the peace, or riding or going armed by night or by day in fairs, markets, or elsewhere. Read thus, the "force in affray of the peace" is read forward into the "riding or going armed." I find that this construction has, from the earliest times, been put upon the statute by text-writers; and, indeed, there is judicial authority in support of it.

In *Sir John Knight's Case* (2), in the second year of James 2, the information set forth that the defendant did walk about the streets armed with guns, and that he went into the church of St. Michael, in Bristol, in the time of divine service, with a gun, to terrify the King's subjects, *contra formam statuti*. The Chief Justice (Sir Edward Herbert) said that the meaning of the statute 2 Edw. 3, c. 3, was to punish people who go armed to terrify the King's subjects.

Hawkins, in treating of this statute, writes:—"And in the exposition of it the following points have been holden, . . . fifthly, that no wearing of arms is within the meaning of the statute unless it be accompanied with such circumstances as are apt to terrify the people, from which it seems clearly to follow that persons of quality are in no danger of offending against the statute by wearing common weapons, or having their usual number of attendants with them for their ornament or defence, *in such places and upon such occasions in which it is the common fashion to make use of them*, without causing the least suspicion of an

(1) 19 T. L. R. 540.

(2) 3 Mod. 117.

Cr. Cas. Res. intention to commit any act of violence or disturbance of the peace ;
 1914. and from the same ground it also follows that persons armed with
 REX privy coats of mail, to the intent to defend themselves against
 v. their adversaries, are not within the meaning of the statute, because
 SMITH. they do nothing *in terrorem populi*.”
 Palles, C.B.

Without referring to old principles, which are admitted by all, we think that the statutable misdemeanour is to ride or go armed *without lawful occasion in terrorem populi*; but we do not decide that it may not be sufficient that one only of the public may be alarmed.

It was argued by the Attorney-General that it was sufficient to follow the language of the statute; and that, therefore, the averment “without lawful occasion” was not necessary; but this old statute must be pleaded according to its construction; and *Turner’s Case* (1), *Geswood’s Case* (2), and the opinion of Blackburn, J., in *Unwin v. Clarke* (3), show that in legislation of this type the averment is essential.

It follows that the indictment under the statute should negative lawful occasion, and conclude *in terrorem populi*; and that, consequently, the first count would have been bad on demurrer.

The Attorney-General, however, further contends that it is good after verdict. In my opinion, that is not so. The words “in affray of the peace” in the statute, being read forward into the “going armed,” render the former words part of the description of the statutable offence. The indictment, therefore, omits two essential elements of the offence—(1) That the going armed was without lawful occasion; and (2) that the act was *in terrorem populi*. It is not necessary to decide whether, having regard to *Reg. v. Holmes* (4), the latter omission might not be cured by verdict; but, undoubtedly, the first defect is fatal.

We are, therefore, of opinion that the judgment on the first count ought to have been arrested; and for this reason we express no opinion whether the evidence is sufficient to support it. Neither do we express any opinion on some of the other questions argued; and, in particular, whether the words “nor in

(1) 9 Q. B. 80.

(2) 2 E. & B. 952.

(3) L. R. 1 Q. B., at p. 424.

(4) *Dearsley*, 207.

no place elsewhere" are to be construed as *ejusdem generis* with *Cr. Cas. Res.* "fairs, markets, &c.," as meaning where persons are assembled or are accustomed to be assembled.

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Palles, C.B.

The other counts charge nuisance. In the second count the act is charged as having been committed in such a manner as to be a nuisance to and alarm the public lawfully using the road. It is not necessary to decide whether to sustain this count it is essential to show that more than one person was alarmed, or was in such a position that he might have been alarmed, as there was no one on the road capable of being alarmed: *R. v. Webb* (1); *R. v. Farren* (2).

In the same way the third count charges the discharge of the loaded revolver to the danger of the public, omitting the words "lawfully using the highway"; but, assuming that the count was not bad for this omission, it must be because it should be assumed to be impliedly stated therein, and, consequently, should be proved; and the proof being that none of the public were present or capable of being endangered, was insufficient.

The case is not similar to that of an act which constitutes a nuisance of a permanent character, such as digging a trench across a highway.

We are further of opinion that Gibson, J., had ample jurisdiction to direct that the prisoner should give sureties of the peace and for good behaviour, even although the verdict should be for him.

In result, then, the judgment will be reversed, and the convictions quashed.

Solicitor for John Smith: *James Brown*.

Solicitor for the Crown: *R. H. Todd*, Crown Solicitor for Londonderry.

C. N. K.

(1) 1 Den. 338.

(2) 9 Cox, 446.

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May 11.

NORRIS HENTY & GARDNERS, LIMITED, v.
ISAAC BECKETT (1).

*Practice—Discovery—Specific document—Application made ex parte—
Order XXXI, Rule 20 (3).*

An application under Order XXXI, Rule 20 (3), for an order requiring a party to state by affidavit whether a specific document is or has at any time been in his possession or power may be made *ex parte*.

Ex parte application on behalf of the plaintiffs that the defendant state whether a memorandum in writing said to have been handed to him was in his possession or power, or whether he had parted with the same.

The application was grounded on the affidavit of Charles H. Hayward, who deposed that he was representative in Ireland for the plaintiffs at the time of the contract, the subject-matter of the action. That on the 23rd April, 1913, he was at Ballina, and negotiated the sale of an engine for £420 to the defendant, and that at the completion of the bargain in the Imperial Hotel, Ballina, at the request of the defendant, he wrote a letter or memorandum in writing in the presence of one Jenkinson, containing the terms of the contract, and handed the same to the defendant in Jenkinson's presence, and that he did not keep a copy of said letter. That he had seen the affidavit of discovery in the action made by the defendant, and the same did not contain or disclose the said letter, and that he was informed and believed that the plaintiffs' solicitor wrote to the solicitor for the defendant, calling for the production of said letter, but same had not been produced, or its absence explained.

(1) Before MOLONY, J.

Charles Murphy, for the plaintiffs :—

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We are entitled to make this application *ex parte* : *O'Malley v. Walsh* (1); *Keating v. Dublin Tram Company* (2).

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[*Molony, J.*, referred to *Roberts v. Dublin Tram Company* (3).]

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In that case an affidavit as to a class of documents was asked for. In this case we are applying for a specific document, which is definitely described.

The application was granted.

The order made in the case was as follows :—

It is ordered that the defendant shall state, within six days from the service of this order, by affidavit, whether a memorandum in writing said to have been handed to him on the 23rd April, 1913, by Charles H. Hayward, at the time of the alleged sale of the engine in the pleadings mentioned, is now or has been at any time in his possession or power, and if not in his possession or power, whether he parted with the same, and what has become thereof.

Solicitor for the applicant : *Ernest E. Merrick*.

A. E. C.

(1) 37 I. L. T. R. 75.

(3) 43 I. L. T. R. 203.

(2) 41 I. L. T. R. 165.

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Nov. 28, 29.

Dec. 1, 19.

COUNTY DUBLIN COUNTY COUNCIL v. HIS
MAJESTY'S POSTMASTER-GENERAL (1).

(1913. No. 1350.)

Telephone service—Permission given by County Council to National Telephone Company, Limited, to erect poles, paying rent for wayleave, and granting special telephone facilities to council—Purchase of Telephone Company's plant, property, and assets, by the Postmaster-General—Postmaster-General not bound by agreement for rent and facilities—Telegraph Act, 1878, ss. 3, 4, 5—Telegraph Act, 1892, ss. 4, 5—"Difference."

A telephone company, licensed by the Postmaster-General under a licence which expired on the 31st December, 1911, in order to secure permission to erect poles, entered into agreements with the plaintiff council, the road authority, under which, in return for such permission or wayleave, the company contracted to pay 1s. per annum for each pole erected in the plaintiff's jurisdiction; to pay a sum of £5 annually towards the cost of a report by the plaintiffs' surveyor; and to supply exchange connections and telephone instruments to certain of the officials of the council either free of cost or at a reduced rate.

By an agreement of 2nd February, 1905, the Postmaster-General purchased the plant, property, and assets of the telephone company, the purchase to be completed on the 31st December, 1911, when the property purchased was to vest in the Postmaster-General absolutely, "subject to all wayleave and other rentals, contracts, and burdens of every kind, subject to which the company may hold the same." Under this agreement, the plant, property, and assets of the company were taken over by the Postmaster-General, who refused to recognize the special facilities given by the company to the plaintiffs in respect of the instruments and connections, or to pay the wayleave, rental, and surveyor's fee, on the ground that there was no continuing liability on him in respect of these matters. The plaintiffs brought an action against the Postmaster-General claiming (*inter alia*) a declaration that by reason of the purchase by him of the plant, property, and assets of the company, and under the agreement of the 2nd February, 1905, he was bound by the contracts entered into by the Telephone Company with the plaintiffs, and specific performance of these contracts.

(1) Before DODD, J.

Held, that the terms of the agreements between the Telephone Company and the road authority were applicable solely to the state of things which continued under the licence from the Postmaster-General to the company, and did not bind the Postmaster-General as assignee of the company; that the clause in the purchase-agreement "subject to all wayleave and other rentals, contracts, and burdens," &c., had no applicability to the relations of the Postmaster-General with the road authority, these relations being regulated by statute and not by the agreements between the road authority and the company; that no right of action was given by sect. 4 of the Telegraph Act, 1892, any rights under that section being enforceable only in the manner provided by sects. 4 and 5 of the Telegraph Act, 1878, for the determination of differences; and that consequently the plaintiffs' action should be dismissed.

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ACTION tried by Dodd, J., without a jury, upon the 28th and 29th November and 1st December.

The matters in issue between the parties appear sufficiently from the pleadings.

The plaintiffs' claim as endorsed on the writ of summons was as follows :—

THE PLAINTIFFS' CLAIM IS FOR—

1. A declaration that by reason of the purchase of the plant, property, and assets of the National Telephone Company, Ltd., and under the agreement for such purchase, dated the 2nd day of February, 1905, made between His Majesty's then Postmaster-General of the first part and the National Telephone Company, Limited, of the other part, the defendant is bound by the following contracts :—

- (A) Agreement, dated 29th September, 1896, made between Robert T. Blackburne and the National Telephone Company, Limited.
- (B) Agreement, dated 12th May, 1898, made between Robert T. Blackburne and the National Telephone Company, Limited.
- (C) Agreement, dated 25th April, 1902, made between the plaintiffs and the National Telephone Company, Limited.

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(v) Agreement, dated 7th March, 1910, made between the plaintiffs and the National Telephone Company, Limited.

2. Specific performance of said contracts.

3. Damages for breaches of said contracts.

4. An injunction to restrain further breaches of the said contracts or any of them.

The defendant applied to the King's Bench Division to set aside the writ on the ground that the Crown could not be sued as represented by the Postmaster-General. The King's Bench Division refused the motion with costs. On appeal to the Court of Appeal the decision of the King's Bench Division was affirmed with the variation that the costs of both parties, below and on the appeal, were made costs in the cause.

The plaintiffs then delivered a statement of claim which set out as follows :—

1. By an agreement in writing, bearing date the 29th day of September, 1896, and made between Robert T. Blackburne, Secretary of the county Dublin Grand Jury, of the one part, and the National Telephone Company, Limited, of the other part, the said Robert T. Blackburne granted to the said company leave and licence to fix and maintain telephone poles already erected by them in that portion of the county Dublin, in situations approved of and otherwise to the satisfaction of the county surveyor, over which the county Dublin Grand Jury were at the date of the said agreement the road authority, and thereby consented to the exercise by the said company of such of the powers of the Postmaster-General as the said company might be authorized to exercise in pursuance of the Telegraph Act, 1892, the said company undertaking (*inter alia*) that so long as the said poles, or any of them, should remain upon the said roads, they would provide and keep in good order one exchange connection free of cost to the office of the county surveyor, and one exchange connection free of cost to the office of the secretary of the said Grand Jury, within the city of Dublin.

2. By a further agreement in writing bearing date the 12th day of May, 1898, and made between the said Robert T. Blackburne of the one part, and the National Telephone Company, Limited, of the other part, expressed to be supplemental to the agreement dated the 29th day of September, 1896, called the principal agreement, pleaded in paragraph 1 hereof, the provisions of the said principal agreement were applied to certain poles to be erected between Dublin and Howth, in positions to be approved of by the county surveyor, and otherwise to his satisfaction; and the said company thereby agreed that so long as the said poles, or any of them, should remain upon the said roads they, the said company, would provide and keep in good order one exchange connection with desk instrument and extra receiver free of cost to the office of the solicitor for the county Dublin Grand Jury, and provide an additional desk instrument free of cost in the office of the county surveyor.

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3. Prior to their execution, the terms of the aforesaid agreements had been approved of by the Finance Committee of the county Dublin Grand Jury, and the said Robert T. Blackburne had been authorized by a resolution of the said committee to grant the leave and licence contained in said agreements on behalf of the said Grand Jury.

4. In accordance with the terms of the said agreements the National Telephone Company, Limited, fixed and maintained the telephone poles therein mentioned, and provided one exchange connection and an additional desk instrument in the office of the county surveyor, one exchange connection to the office of the secretary of the Grand Jury, and one exchange connection with desk instrument and extra receiver to the office of the solicitor for the Grand Jury, and maintained the same in good order.

5. Under the provisions of the Local Government (Ireland) Act, 1898, the plaintiffs were constituted as a corporate body, and entrusted with the management of the administrative and financial business of the county of Dublin, including the business of the Grand Jury of the said county; the powers and duties of the said Grand Jury were conferred and imposed upon the plaintiffs; the property, debts, and liabilities of the said Grand Jury passed to and vested in the plaintiffs; and the existing officers of the said

K. B. Div. Grand Jury, including the secretary, solicitor, and county surveyor,
1913. became the officers of the plaintiffs, as by the said Act provided.

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6. The rights and liabilities of the county Dublin Grand Jury, under the agreements set forth in paragraphs 1 and 2 hereof, were thus vested in the plaintiffs; and the National Telephone Company, Limited, by virtue of the leave and licence granted by such agreements, continued to maintain the telephone poles and to provide and maintain the telephone exchanges free of cost as provided by said agreements.

7. By an agreement in writing, bearing date the 25th day of April, 1902, and made between the plaintiffs of the one part, and the National Telephone Company, Limited, of the other part, expressed to be supplemental to the agreement dated the 29th day of September, 1896, called the principal agreement, pleaded in paragraph 1 hereof, the provisions of the said principal agreement were applied to all telephone poles erected, or to be erected, between the 25th day of October, 1900, and the 31st day of December, 1903, and the said company thereby agreed to pay to the plaintiffs the sum of one shilling per annum, for each pole erected, or to be erected, by them in the county Dublin, between the said dates, the rent for each pole to run from the date of its erection, and the said company undertook to supply, if required, one exchange connection at the residence of the secretary of the council, and one exchange connection at the residence of the county surveyor, and to charge for each of the said connections one half only of the ordinary rates charged to customers of the company.

8. By a further agreement in writing, bearing date the 7th day of March, 1910, and made between the plaintiffs of the one part, and the National Telephone Company, Limited, of the other part, expressed to be supplemental to the agreements hereinbefore pleaded, the terms of the agreement pleaded in the preceding paragraph hereof were applied to all wayleaves granted by the plaintiffs to the said company subsequent to the 31st day of December, 1903, and the said company thereby (*inter alia*) agreed to pay to the plaintiffs the annual rent of one shilling for each wayleave for a pole granted by the plaintiffs between the 31st day of December, 1903, and the 31st day of December, 1911, the said rent for each pole to commence to run from one month after

the date of the consent to the erection of such pole being given by the county surveyor or by the plaintiffs.

9. Various poles were from time to time erected by the National Telephone Company, Limited, under the licence contained in the said agreements of the 25th April, 1902, and 7th March, 1910. The wayleaves payable in respect of such poles under the said agreements were duly paid by the said company to the plaintiffs, and in accordance with their undertaking the said company provided one exchange connection at the residence of the secretary of the county council, and one exchange connection at the residence of the county surveyor, and charged in respect thereof one-half only of the ordinary rates charged to customers of the company.

10. Under and by virtue of the powers in that behalf conferred upon him by the Telegraph Acts, 1863 to 1878, the defendant has purchased the plant, property, and assets of the National Telephone Company, Limited; the said purchase was carried into effect by an agreement dated the 2nd day of February, 1905, and made between the defendant of the one part, and the National Telephone Company, Limited, of the other part. The defendant thereby agreed to buy and the company agreed to sell and convey on the 31st day of December, 1911, all the plant, land, and buildings of the company, in use, on the 31st day of December, 1911, for the purposes of the licensed telephone business of the company. The said agreement provided that all the plant, property, and assets of the company, purchased under the said agreement, should be handed over to the defendant, and that upon such transfer all the estates, interests, rights, powers, and authorities possessed by the company in relation thereto should become the property of and vest in the defendant absolutely for all the estate and interest previously enjoyed therein by the company, but subject to all wayleave and other rentals, contracts, and burdens of every kind, subject to which the company should hold the same, or which the company might be liable to pay, observe, perform, or bear in connection therewith.

11. The defendant now repudiates the agreements entered into by the National Telephone Company, Limited, pleaded in paragraphs 1, 2, 7, and 8 hereof, alleging that he is not bound thereby, and has refused, and still refuses, to pay the wayleaves, or

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K. B. Div. maintain the telephone services on the terms provided by the
 1913. said agreements. By letter dated the 10th day of July, 1912, the
 DUBLIN Co. COUNCIL defendant notified the plaintiffs that he would not pay rent for the
v. use of public roads for telegraphs, that he was not bound by way-
 POSTMASTER- leave agreements to which he was not a party ; that he would not
 GENERAL. accept obligations contracted by the National Telephone Company,
 Limited, which (as he alleged) conflicted with his statutory rights ;
 and that all telephonic services, if retained, must be paid for at
 public tariff rates.

12. The telephone poles erected by the National Telephone Company under the aforesaid agreements still remain in the positions in which they were erected, and the defendant continues to use the same.

13. By letter bearing date the 26th day of September, 1912, the District Surveyor for Dublin Post Office Telephones on behalf of the defendant notified the plaintiffs' solicitor that if the annual rentals for the telephone exchanges mentioned in the said agreements, amounting in all to £30 10s., were not paid within fourteen days the said telephone services would be withdrawn. The plaintiffs' solicitor by letter in reply, dated the 3rd day of October, 1912, stated that the said telephone exchanges had been provided and maintained in pursuance of the agreements entered into by the National Telephone Company hereinbefore pleaded, and claimed that the plaintiffs were entitled to have the said exchanges maintained on the terms mentioned in the said agreements.

14. The plaintiffs not having paid the amount so demanded, the telephone services to the said exchanges were withdrawn. By reason of such withdrawal as aforesaid the plaintiffs have been compelled to pay the sum of £30 10s., in order to have the said telephone services renewed and continued. The said sum was paid to the defendant's servants as follows, viz., £9 5s. on the 4th November, and £21 5s. on the 11th November, 1912, under protest and without prejudice to the plaintiffs' rights to recover the same by legal proceedings.

The plaintiffs' claim is for :—

1. A declaration that by reason of the purchase of the plant, property, and assets of the National Telephone Company, Limited,

and under the agreement for such purchase, dated 2nd February, 1905, made between His Majesty's then Postmaster-General of the one part, and the National Telephone Company, Limited, of the other part, the defendant is bound by the following contracts :—

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(A) Agreement dated 29th September, 1896, made between Robert T. Blackburne and the National Telephone Company, Limited.

(B) Agreement dated 12th May, 1898, made between Robert T. Blackburne and the National Telephone Company, Limited.

(c) Agreement dated 25th April, 1902, made between the plaintiffs and the National Telephone Company, Limited.

(D) Agreement dated 7th March, 1910, made between the plaintiffs and the National Telephone Company, Limited.

2. Specific performance of said contracts.

3. £150 damages for breaches of the said contracts.

4. £30 10s., money had and received by defendant to the use of the plaintiffs.

5. That if necessary an account may be taken of the amount due by defendant to the plaintiffs in respect of wayleave under the said contracts.

6. An injunction to restrain further breaches of the said contracts or of any of them.

The defence set out as follows :—

1. His Majesty's Postmaster-General says and will submit that an action does not lie against the Crown as represented in these proceedings by His Majesty's Postmaster-General in respect of any of the matters stated in the statement of claim, or for the declaration, specific performance, account, relief, damages, or injunction, prayed for therein.

2. Subject and without prejudice to the submissions and contentions aforesaid, and by way of plea to the further continuance of this action, the Postmaster-General says that the differences which have arisen between the plaintiffs, the county

K. B. Div. Dublin County Council, and the Postmaster-General, are differences
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GENERAL, within the meaning of the 4th section of the Telegraph Act, 1892,
and the Postmaster-General contends that such differences should
be determined as provided by the Telegraph Acts, 1878 and 1892,
and upon the 26th February, 1913, the Postmaster-General gave
notice to the plaintiffs asking for the withdrawal of the terms,
conditions, and stipulations, upon which the National Telephone
Company, Limited, had obtained the consent of the plaintiffs
to the erection and maintenance of the telegraph poles and lines
the subject of this action, and the plaintiffs failed to withdraw
the said terms, conditions, and stipulations within twenty-one
days after the giving of the said notice, whereupon a difference
arose between the plaintiffs and the Postmaster-General which
should be determined in the manner provided by sections 4 and 5
of the Telegraph Act, 1878.

3. Subject and without prejudice to the submissions and
contentions aforesaid H.M. Postmaster-General says as follows:—
As to the agreement dated 29th September, 1896, and made
between Robert T. Blackburne, Secretary of the county Dublin
Grand Jury, of the one part, and the National Telephone Company,
Limited, of the other part, in the first paragraph of the statement
of claim mentioned, the powers conferred on the Postmaster-
General by the Telegraph Acts, 1863 to 1878, are powers of
construction, and the districts in the county of Dublin subject
to the jurisdiction of the said county Dublin Grand Jury were
rural districts, and the National Telephone Company, as licensees
of the Postmaster-General for the purpose of transmitting
telegrams, were not authorized to exercise, and could not in
pursuance of the Telegraph Act, 1892, lawfully exercise, within
such area, any of the said powers conferred on the Postmaster-
General by the Telegraph Acts, 1863 to 1878, and the consent
of the said Grand Jury to the exercise by the said National Tele-
phone Company, Limited, of such powers was ineffective and
void.

4. The said agreement of the 29th September, 1896, contained
a provision that the said company would, whenever directed so to
do by the county surveyor, remove the telephone poles erected in
that portion of the county of Dublin under the jurisdiction of the

said Grand Jury, and re-erect them in such places as the county surveyor should from time to time direct; and the Postmaster-General says that such a condition is not applicable to the Postmaster-General, and does not impose any continuing liability on him.

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5. The condition in the said agreement that the National Telephone Company would provide an exchange telephone connection free of cost to the office of the Secretary of the said Grand Jury is not applicable to the Postmaster-General. The Postmaster-General could not grant such a privilege, having regard to his statutory obligation under the Telegraph Acts to make uniform charges for the transmission of telegraphic messages.

6. As to the supplemental agreement of 12th May, 1898, in the 2nd paragraph of the statement of claim mentioned, the Postmaster-General repeats the averments in the 2nd and 3rd paragraphs of this defence, and says that the provisions in the said agreement are not applicable to or binding on the Postmaster-General, and the Postmaster-General further says that the agreement by the said National Telephone Company to provide an exchange telephone connection with the instrument and receiver therein mentioned free of cost to the office of the solicitor for the county Dublin Grand Jury, and an additional desk instrument free of cost in the office of the county surveyor, is not applicable to the Postmaster-General. The Postmaster-General could not grant such a privilege, having regard to his said statutory obligation to make uniform charges for the transmission of telegraphic messages.

7. As to the 3rd, 4th, and 6th paragraphs of the statement of claim, the Postmaster-General repeats the averments contained in the 2nd, 4th, 5th, and 6th paragraphs of this defence.

8. As to the supplemental agreement dated 25th April, 1902, in the 7th paragraph of the statement of claim mentioned, the Postmaster-General repeats the averments hereinbefore pleaded in reference to the principal agreement dated 29th September, 1896, and the Postmaster-General further says that the licence and powers of the National Telephone Company, Limited, to carry on the business of transmitting telegrams ceased on the 31st December, 1911, and the agreement by the said company to pay

K. B. Div. to the plaintiffs the sum of one shilling per annum for each
 1913. telephone pole erected or to be erected as therein provided is
 DUBLIN not applicable to, and imposed no continuing liability on, His
 Co. COUNCIL. Majesty's Postmaster-General, who is, in exercising his statutable
 v. rights under the Telephone Acts for the public benefit, entitled
 POSTMASTER- to erect and maintain telegraph poles upon and along the public
 GENERAL. roads free from any liability to pay wayleave or other rentals
 to the county council as the road authority, and the Postmaster-
 General says that no rentals for wayleave are payable by him to
 the plaintiffs.

9. As to the provision in the said agreement of 25th April, 1902, that the National Telephone Company, Limited, would supply exchange telephone connections at the residences of the secretary of the county council and of the county surveyor respectively, and charge for the same one-half only of the ordinary rates charged to customers of the company, the Postmaster-General says that such agreement is not applicable to His Majesty's Postmaster-General, and to give any such preferential advantage would be a violation of the obligation of the Postmaster-General to charge uniform rates to all members of the public for telephonic services.

10. As to the agreement dated 7th March, 1910, made between the plaintiffs and the National Telephone Company, Limited, in the 8th paragraph of the statement of claim mentioned, the Postmaster-General repeats the averments hereinbefore pleaded in the preceding paragraphs of this defence, and says that no rentals are payable by His Majesty's Postmaster-General to the plaintiffs.

11. As to the 10th paragraph of the statement of claim, the agreement of 2nd February, 1905, together with a certain agreement supplemental thereto, dated 8th August, 1905, made between His Majesty's Postmaster-General on behalf of His Majesty of the one part, and the National Telephone Company, Limited, of the other part, for the purchase of the plant, property, and assets, of the National Telephone Company, Limited, was not, as alleged in the statement of claim, a purchase by the Postmaster-General under and by virtue of the powers in that behalf conferred upon him by the Telegraph

Acts, 1863 to 1878. The Postmaster-General did not require any special statutory authority to purchase, and did not purchase, the plant and chattels of his licensees, the National Telephone Company, Limited, under any special powers conferred by the Telegraph Acts, 1863 to 1878, in that behalf. The Postmaster-General, as carrying on the telegraph service on behalf of His Majesty the King, had power to purchase all chattels necessary for telegraphic purposes, and it was by virtue of such power that the Postmaster-General purchased the plant, property, and assets of the National Telephone Company, Limited, and the Postmaster-General had power under the statute 3 & 4 Vict. c. 96, and the Post Office Act, 1908, to agree to purchase, and did under such powers purchase, the lands and buildings of the National Telephone Company, Limited.

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12. As to the said 10th paragraph of the statement of claim, the Postmaster-General says that there were no wayleave or other rentals payable to the plaintiffs, or contracts with them, subject to which the National Telephone Company held any portion of their plant, or carried on their business prior to the 31st December, 1911, in that portion of the County of Dublin in which the plaintiffs are the road authority, which the National Telephone Company were liable to pay, observe, or perform, after the said 31st December, 1911, when their licence from His Majesty's Postmaster-General to carry on telegraphic business ceased, and no continuing liability exists in respect of any such wayleave or other rentals or contracts, nor was any such transferred to the Postmaster-General by virtue of the said agreement.

13. The Postmaster-General further says that in so far as any agreement entered into between the plaintiffs and the National Telephone Company, Limited, contained any provisions conflicting with the statutory rights or obligations of the Postmaster-General in carrying on the telegraphic service on behalf of His Majesty, such agreements impose no liability upon, and are void as to, the Postmaster-General.

14. As to the 13th and 14th paragraphs of the statement of claim, the Postmaster-General says that the plaintiffs, their solicitor, county surveyor, and secretary, are not entitled to free or preferential rates for telephonic service supplied by the Post-

K. B. Div. master-General, and that the contracts in that behalf between
 1913. the plaintiffs and the Grand Jury of the County of Dublin, and
DUBLIN the National Telephone Company, Limited, impose no con-
Co. Council tinuing liability on the Postmaster-General, and that the plaintiffs
v. were not, and are not, entitled to have such services continued by
POSTMASTER- the Postmaster-General on the terms mentioned in the said
GENERAL. agreements.

The plaintiffs delivered a reply, joining issue, and stating that they would object that paragraphs 2 and 3 of the defence disclosed no defence to the plaintiffs' claim.

As the matters preferred in argument are sufficiently dealt with in the judgment, it is not thought necessary to deal with the arguments further than to state the authorities to which counsel referred.

John Clancy, K.C. (with him *Stephen Ronan, K.C.*, and *Timothy Sullivan*), for the plaintiffs, referred to *Pollock on Contracts* (1911 ed.), p. 395; *Sewell v. Royal Exchange Assurance Company* (1); *Haines v. Beach* (2).

The Attorney-General (John F. Moriarty, K.C.) and A. W. Samuels, K.C. (with them *The Solicitor-General (Jonathan Pim, K.C., and Gerald Horan)*), for the defendant, referred to *Wandsworth District Council v. United Telephone Co.* (3); *R. v. United Kingdom Electric Telegraph Co.* (4); *R. v. Train and Others* (5); *Edgware Highway Board v. Harrow District Gas Co.* (6); *Fareham Local Board and Fareham Electric Light Co. v. Smith* (7); *Attorney-General v. Mayo County Council* (8); *Postmaster-General v. Corporation of Glasgow* (9); *Postmaster-General v. Corporation of Edinburgh* (10); *Attorney-General v. Edison Telephone Co.* (11); *Cochrane v. Exchange Telegraph Co.* (12); *Wolverhampton New Waterworks Co. v. Hawkesford* (13); *Atkinson v. Newcastle and*

(1) 4 Taunt. 856.

(2) 5 Taunt. 521.

(3) 13 Q. B. D. 904.

(4) 9 Cox, 174.

(5) 2 B. & S. 640.

(6) L. R. 10 Q. B. 92.

(7) 7 T. L. R. 443.

(8) [1902] 1 I. R. 13.

(9) 10 Ry. & Ca. Cases, 238.

(10) *Id.*, p. 247.

(11) 6 Q. B. D. 244.

(12) 65 L. J. (N. S.) 344.

(13) 6 C. B. (N. S.) 356.

Gateshead Waterworks Co. (1); *Robinson v. Workington Corporation* (2); *Institute of Patent Agents v. Lockwood* (3); *Telephone Co. v. Postmaster-General* (4). K. B. Div.
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Timothy Sullivan, in reply.

Cur. adv. vult

Dodd, J.:—

Dec. 19.

This action has been brought by the county Dublin county council against the Postmaster-General. It is founded upon four agreements with the National Telephone Company, Limited. The first was made on the 29th September, 1896, between Mr. Blackburne, the secretary of the county Dublin grand jury, and the National Telephone Company. The second, dated 12th May, 1898, was between the same parties and was supplemental to the first agreement. The third was made on the 25th April, 1902, between the county Dublin county council and the National Telephone Company. The fourth was dated the 7th of March, 1910, between the same parties.

The relief sought is a declaratory order binding the Postmaster-General, a decree for specific performance against the Postmaster-General, an inquiry as to damages, and, as part of the relief, a judgment for the amount of money alleged to have been paid under protest, amounting to £30 10s.

The liability which is sought to be enforced upon the Postmaster-General is alleged to be contained in an agreement of the 2nd February, 1905, which was carried into complete effect by an indenture of the 8th August, 1905, between the then Postmaster-General and the National Telephone Co., Ltd. The agreement received the sanction of the House of Commons. The memorandum explaining the agreement to the House of Commons sets out the terms upon which the Postmaster-General was to take over the whole business carried on up to that date by the company, and was to acquire the plant of the company on "tramway" terms. Those terms were that no payment was to be made in

(1) 2 Ex. Div. 441.

(2) [1897] 1 Q. B. 621.

(3) [1894] A. C. 347.

(4) [1913] A. C. 546.

K. B. Div. respect of goodwill or profits, except in the private wire business
 1913. — of the company, which could be carried on without the Postmaster-
 DUBLIN General's licence, and the very few cases where the company's
 Co. COUNCIL licence had, under the provisions of the Telegraph Act, 1899, been
 v. extended beyond 1911. The agreement of the 2nd February, 1905,
 POSTMASTER- which was scheduled to the memorandum of the 14th February, 1905,
 GENERAL. recites the various licences and other transactions in connection
 Dodd, J. with telephone development. It includes a recital that the trunk
 lines had been acquired by the Postmaster-General upon payment
 of the purchase-money specified, and that since that date the
 company had transacted telephonic business according to the
 provisions of the trunk-line agreement within exchange areas, and
 not elsewhere. It contains a recital that it had been agreed
 between the Postmaster-General and the company that the
 company should, as from the 31st of December, 1911, cease
 to transact any telephonic business, and that the Postmaster-
 General should purchase all such plant, property, and assets
 of the Company as thereafter specified.

The matter for determination arises upon Clause 6. Sub-clause 1 deals with the apportionment of the current income and outgoings:—"The company shall pay to the Postmaster-General a proportion of all rentals and subscriptions, and the Postmaster-General shall pay or allow a corresponding proportion of any sums paid or payable by the company to the Postmaster-General in advance by way of royalty. The Postmaster-General shall undertake the collection of all outstanding rentals and other moneys, and shall render such accounts to the Company as may be agreed between the parties or determined by arbitration."

Then come the provisions upon which the whole of the present controversy arises. Sub-clause 2:—"The company shall upon the 31st December, 1911, deliver and hand over to the Postmaster-General all plant, property, and assets of the company which may be purchased by him under this agreement, and upon such transfer all estates, interests, powers, and authorities possessed by the company in relation thereto shall become and be deemed to be the property of and shall vest in the Postmaster-General absolutely for all the estate and interest previously enjoyed therein by the company, freed from any charge or incumbrance thereon

created by the company, *but subject to all wayleave and other rentals, K. B. Div. contracts, and burdens of every kind subject to which the company may hold the same, or which the company may be liable to pay, 1913.* observe, perform, or bear in connection therewith; and so far as such rentals, contracts, and burdens are continuing liabilities, the *DUBLIN Co. COUNCIL v. POSTMASTER-GENERAL.* Postmaster-General shall indemnify the company against the same." *Dodd, J.*

Before dealing in detail with the four agreements, the burden of which it is alleged the Postmaster-General took upon himself, I desire to make one or two comments upon the nature of the relief claimed. The declaration sought is a declaration that *by reason of the purchase of the plant, property, and assets, and under the agreement of the 2nd February, 1905, made between His Majesty's Postmaster-General and the National Telephone Company, Ltd., the defendant, the Postmaster-General, is bound.* In other words, the claim against the Postmaster-General is as assignee of the Telephone Company, and not otherwise. If it is not in that right he is sued, the whole foundation of the case gives way.

The next thing to which I desire to call attention is the position of the contracting parties to the agreements between the Telephone Company and the road authority which I am asked to enforce against the Postmaster-General. What had each party to give? what could each get?

The Telephone Company by virtue of a "Licence and Agreement" with the Postmaster-General obtained a licence and permission from the Postmaster-General to carry on the telephone business from the 1st January, 1881, for thirty-one years. The licence contained an express provision that the agreement was not to affect the Postmaster-General's rights. [His Lordship read the clause, and continued.] And the clause concludes:—"Nothing herein contained shall be deemed to authorize the company to exercise any of the powers or authorities conferred on or acquired by the Postmaster-General by or under the Telegraph Acts or any of them."

The other contracting party was, in respect of the first agreement, the secretary of the grand jury. Whether the grand jury had power, under any Act of Parliament regulating their powers

K. B. Div. and duties, to grant what is called a "wayleave" over the county roads, is open to serious argument. The defendant before me
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 says that such a grant was illegal, and cases were cited to establish this argument. The word "illegal" is ambiguous. It may be, and I think is, the law that a person creating a nuisance on the highway cannot justify under a licence from the road authority; but the decision in the *Edgeware Highway Board v. The Harrow District Gas Company* (1) in its reasoning seems to be good sense as well as good law. Blackburn, J., says, at p. 95:—"I do not think the licence to open the highway is necessarily a licence to commit an indictable nuisance. It is quite possible to open the highway without creating a nuisance." Mellor, J., says:—"I am satisfied that the allegations on the record do not show that necessarily the licence is one to commit an indictable offence. Secondly, if certain parties come together, and one, assuming the other has authority to give a licence to open a highway, agrees that, if the licence be given, he will restore the road to its original good condition, and also pay a certain sum of money, I am of opinion there is a good consideration for the agreement." That case was sought to be distinguished on the ground that it had reference merely to a temporary opening of the road, and not to a continuous erection of poles, which must be an obstruction, and therefore illegal. It is not necessary to pursue this argument further, as I think the matter is not vital for my decision. I allude to it only as indicating the position of the parties to the agreements, the subject of this action, and I assume it was legal as between themselves.

The other contracting party—the Telephone Company—were in this position. They had, under the licence from the Postmaster-General, none of his powers or authorities. They were not within the Telegraph Act, 1863: *Wandsworth Board of Works v. United Telephone Company* (2). But, again, I think good sense is good law. The one contracting party wanted something—to erect poles; the other had something it could purport to give—the right to erect poles. They made a bargain under those circumstances.

(1) L. R. 10 Q. B. 92.

(2) 13 Q. B. D. 904.

The question is, was that agreement binding on the Postmaster-General? K. B. Div.
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There is one matter to be disposed of, at any rate in part, at this stage of the consideration. It was, for a time, suggested the Telephone Company did possess some of the powers of the Postmaster-General. It certainly did not under the licence, but it was suggested it acquired those powers under or by virtue of a statute. Once you get into the statutory provisions you get away from the agreement, and the action would be not under the agreement but by virtue of a statute, which, as I shall show presently, would raise a wholly different relation between the parties to this litigation; but, for the present, I deal with it only as to the relation *inter se* of the parties to the agreements.

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By the Telegraph Act, 1892 (sect. 5), it is enacted—“(1) Where the Postmaster-General has either before or after the passing of this Act licensed any company or person to transmit any telegrams within the meaning of the Telegraph Acts, 1863 to 1899, he may by the same or any other licence authorise such company or person (in this Act referred to as the licensee) during the time and within the area specified in the licence to exercise the powers which are conferred on the Postmaster-General by the Telegraph Acts, 1863 and 1878, and by the provisions of this Act relating to Provisional Orders, or such of those powers as are specified in the licence, and thereupon the enactments conferring those powers, or relating to the exercise thereof, including any penal provisions, shall apply accordingly.” Then follows the proviso:—“(2) Provided as follows—(a) A licensee shall not exercise any powers under the said enactments except in an urban sanitary district or such area adjoining an urban sanitary district as is described in the licence.”

The plaintiffs are not the road authority for an urban sanitary district, and no adjoining area is specified in any licence. Again, I think this is not very material; for if the powers had been granted by the Postmaster-General, it could hardly be contended that he bought back his own powers, of which he had only temporarily divested himself.

There is another section in the same Act—sect. 4—which is, I think, the section on which the determination of this case

K. B. Div. will depend; but for the present I do not deal with it. I am
 1913. — anxious now merely to get at the position of the contracting
 DUBLIN parties to the agreements. There was something they could
 Co. COUNCIL bargain about between themselves; but was it something that
 v. could survive the agreements between themselves and bind the
 POSTMASTER-GENERAL. Postmaster-General as assignee? The one party had no authority
 — to enforce the putting up of poles; the other had a doubtful
 Dodd, J. authority to grant leave, but, assuming it to have authority, the
 agreement of 29th October, 1896, was entered into. Let me now
 go through the agreements in full detail.

Clause 1 grants leave and licence to fix and maintain poles already erected by the company in that portion of the county of Dublin, and accordingly consents to the exercise by the Company of such of the powers of the Postmaster-General as the Company might be authorised to exercise in pursuance of the Telegraph Act, 1892. But the Company were not authorized to exercise any of the powers of the Postmaster-General. That is one of the provisions I am asked to declare binding upon the Postmaster-General. The Postmaster-General does not get his powers under that clause; he gets his powers under the statutes, and, subject to certain regulations imposed by statute, can enforce his powers against an unwilling road authority. In my opinion he takes nothing under that clause by the agreement between him and the Telephone Company.

The second clause is:—"The company agree that whenever directed to do so by the county surveyor during the continuance of the leave or licence they will remove any of the said poles and re-erect the same in such place or places as the county surveyor may from time to time direct." The Postmaster-General has an over-riding power over such matters by the statute to which I shall presently refer, subject to statutory provisions, as will presently appear. I cannot declare that clause binding upon him.

The next clause is that "the company shall provide an exchange connection free of cost to the office of the county surveyor, and pay to the secretary of the grand jury on the 1st of April of each year £5 for the cost of an annual report by the county surveyor." Assuming for the moment that this provision is one capable of being carried over beyond the termination of

the licence, and when the dominion over the system had been acquired by the Postmaster-General (by purchase, if you will), is it (a) such a provision as would be binding upon him, he having power by statute to fix rates and being under an obligation to fix them equally among all applying; and (b) such a provision as would be enforced by a declaration of right and a decree for specific performance? To ask the question is to answer it.

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Clause 5 and clause 7 are merely ancillary, and do not call for comment. But what of clause 6? "The leave or licence hereby granted shall be determinable on the 31st of December, 1898, and at any time thereafter by six months' notice in writing; and on the expiration of the period mentioned the Company will, at their own expense, remove the said poles and make good all the damage incident to the removal." I pressed counsel for the plaintiff to say did they contend that that section was applicable to the Postmaster-General. I cannot decide this case upon the answers to interlocutory questions by the Judge. Mr. Timothy Sullivan argued the case with great ability, if I may venture to say so, and answered my questions with much dexterity. I was not satisfied, however, that any answer could be given to this but one. The answer must be "No," because the matter was regulated by a controlling section. But suppose there was no controlling section? Could any Court, on such a state of facts, grant the relief here sought—a declaration that the agreement is binding, and a decree for specific performance? It seems to violate every rule. It is an agreement that can be terminated in six months; the declaration sought for is a declaration as to the legal effect of a written document; the consequential relief could not be granted, and the only remedy under the agreement would be an order on the Postmaster-General to pay every 1st of April to the county surveyor the sum of £5.

The second agreement of the 12th May, 1898, provides, and provides solely, for the erection of an exchange connection, with desk instrument and extra receiver, free of cost, to the office of the solicitor for the grand jury, and an additional desk instrument, free of cost, in the office of the county surveyor. The term was extended to 1903. Up to this there had been no charge for poles or "wayleave," as it is called.

K. B. Div. The third agreement was with the county council on the
 1913. 25th April, 1902. It provided for the payment of 1s. per annum
 DUBLIN for each pole, and the company undertook to supply, if required,
 Co. COUNCIL v. one exchange connection at the residence of the secretary of the
 POSTMASTER- county council, and one exchange connection at the residence of
 GENERAL. the county surveyor, at one-half the usual charge.

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The fourth agreement extended the term till the 31st December, 1911, and at that date the agreement I am asked to enforce came to an end. If the business had not been resumed by the Postmaster-General, and he had extended the licence of the Telephone Company, there would have been need of a new agreement between the county council and the Telephone Company.

It becomes necessary now to inquire how the relations between the Postmaster-General and the road authorities were regulated by statute, that we may decide whether he took anything under these agreements. By sect. 3 of the Telegraph Act, 1878, if any body or person (within the meaning of the Telegraph Act, 1863) having power under the said Act to give or withhold consent to the *Postmaster-General* placing telegraphs, &c.) fail within twenty-one days after being required so to do by the Postmaster-General to give their consent or attach to their consent any terms, conditions, or stipulations, to which the Postmaster-General objects, or withdraw a consent, a difference shall be deemed to have arisen, and an authority is appointed, which may, if after hearing all the parties concerned they think it just, give their consent, either unconditionally or subject to such pecuniary or other conditions and stipulations as they may think just, and that consent shall for all purposes be of the same effect as if it was a consent given under the Telegraph Act, 1863, to the Postmaster-General.

By sect. 4, sub-s. 1, of the Telegraph Act, 1892, it is enacted that where a telegraphic line of the Postmaster-General has been constructed, either before or after the passing of the Act, whether by him or a person through whom he claims, and has been constructed, independently of the Telegraph Acts (as is the case here), a road authority who, if the line had been constructed in accordance with the Acts would be entitled to require its removal, may require the removal, but, *until the removal is required, the line*

shall be deemed to have been lawfully constructed; and then comes the proviso—"Provided that if and so far as the telegraphic line is constructed under or along a street or public road, sections 3, 4, and 5 of the Telegraph Act, 1878, shall apply as if the requisition to remove were a failure to consent."

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And sub-s. 2 of the same section runs :—"Where either before or after the passing of this Act any consent for the construction of a telegraphic line along a street or public road has been given, subject to any term, condition, or stipulation, to a person through whom the Postmaster-General claims, the Postmaster-General may give a notice to the authority or person giving the consent, asking for the withdrawal of the term, condition, or stipulation, and if the authority or person fail to withdraw it within twenty-one days after the notice is given, a difference shall be deemed to have arisen between the authority or person and the Postmaster-General, and shall be determined in the manner provided by sections 4 and 5 of the Telegraph Act, 1878."

I will not stay to inquire whether, under the first sub-s., the county council could, by requiring removal, itself initiate the arbitration proceedings. It is clear that the clause in the agreement requiring six months' notice on the part of the Postmaster-General has no application. By serving the notice he can, within twenty-one days, over-ride this section of the agreement. It seems equally clear that he can call for the withdrawal of the stipulation of the 1s. a pole. What remains but the provision as to the supplying officials of the council with instruments free of charge or at a reduced charge? Nothing. But these are not powers which are acquired by the Postmaster-General *by reason of the purchase*. They are powers conferred upon him by statute. It was contended before me that the effect of sub-s. 1 was to validate the agreement between the company and the county council. What was enacted was that the construction of the poles was deemed to be lawful. Sub-s. 2, it was contended, made the consent binding upon the Postmaster-General at any rate until he asked for the withdrawal. That is not the true meaning, I think; but, if it be the true meaning, three things in my opinion follow—indeed, whether it be the true meaning or not, the same result follows :—

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(1) It cannot reasonably be contended that this is an obligation arising out of the purchase.

(2) It cannot reasonably be contended that if by sub-s. 2 this stipulation is still in force, any rights arising upon that sub-s. can be enforced by action against the Postmaster-General or by petition of right against the King. The differences that arise are to be determined in the way provided by the section.

(3) And it cannot reasonably be contended that a Judge of the High Court could, under the circumstances, give a declaration of right, when the stipulations which are sought to be enforced could be at once, if not determined by the Postmaster-General by his own mere action, at any rate put in train for modification, and possible withdrawal, by a notice to take effect in twenty-one days.

In point of fact, the notice was served in the most formal way by Mr. Norway, the secretary of the General Post Office in Ireland, on the 26th February, 1913. The writ in this action was issued on the 1st February, 1913. That, it is said, is too late. It is late, perhaps, to sustain in its entirety the second ground of defence, which is based upon the section to which I have referred; but how else is it late? Am I to make a declaration of right against the Postmaster-General, a decree for specific performance, an inquiry as to damages, which will necessarily go by the board the moment it is issued? It would be to bring some discredit on the jurisdiction of the Court if it made a decree that might be relegated to the waste-paper basket.

Counsel for the defendant, however, without relying on this ground, or on the ground put forward by Sir Alexander King in his circular letter of the 24th January, 1912, to which I shall come back, made application to the Court to stay proceedings, upon the ground and, so far as I can see, upon the sole ground, that the procedure was wrong. The plaintiffs, it was said, should have proceeded by petition of right. On such an application the Court was bound to assume that the action was properly laid. The claim was based upon an allegation that by reason of the purchase of the plant, property, and assets of the Telephone Company, and under the agreement of the 2nd February, 1905, the cause of action arose. Various matters of controversy were zealously

debated, and the question of writ or petition of right occupied my brethren of the King's Bench Division, and afterwards the Judges of the Court of Appeal, for a considerable time. The result was that the Court of Appeal, following the King's Bench, decided that the matter was not so clear as to warrant a decision upon a summary application, and it was left for determination, if necessary, along with the other issues to be tried. I refer to the matter now for the purpose of making clear what I do not decide. If the facts of the case, as proved, satisfied me that the obligation which it is sought to enforce against the Postmaster-General was one that arose *by reason of something* he had acquired under the purchase agreement, I should have to decide the matter; but I cannot pronounce judgment on an hypothetical case. I wish to be the more emphatic about this in consequence of some observations made by me during the course of trial. Whatever those may have indicated as to my bent of mind, I do not decide this question. Nor do I decide—and I wish to make this quite clear—whether the Postmaster-General acquired this plant and property *by the exercise of his powers as a corporation*. The ground upon which I propose to decide the case is different from this, and inasmuch as it seems like this, I am the more anxious to differentiate it. The argument is that he *purchased* as Postmaster-General, and not under the powers of the Acts authorising the Postmaster-General to purchase an undertaking by virtue of his office. Under the purchase agreement there was no "burden" placed on him in this respect. I do not, accordingly, decide whether it was an undertaking that was purchased or not, nor whether the purchase was under and by virtue of the Telegraph Acts in that regard. What I do decide is:—

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(1) That the terms of the four agreements mentioned in the pleadings were terms applicable, and applicable solely, to the state of things which continued under the licence, and so do not bind the Postmaster-General as assignee, and that the agreements came to an end with the licence out of which they sprung.

(2) That the clause in the purchase agreement "subject to all wayleave and other rentals, contracts, and burdens of every kind subject to which the Company may hold the same," has no

K. B. Div. applicability to the relations of the Postmaster-General with the
 1913. road authority, and that these relations are regulated by the
 DUBLIN statutes to which I have referred, and not by agreements made
 Co. COUNCIL v. between the plaintiffs and the licensees.

POSTMASTER- (3) That no right of action against the Postmaster-General
 GENERAL. can be spelled out of the 4th section of the Act of 1892, an apt
 Dodd, J. tribunal being created to adjust "differences" between them, and
 the mere fact that the differences have not been formulated
 makes no difference. There was no right of action given.

(4) In other words, I adopt the ground taken by Sir Alexander
 King in his letter of 24th January, 1912:—"The acquired plant
 is now being worked and maintained as part of the telegraph and
 telephone system of the State, and must be deemed to have been
 constructed by the Postmaster-General under the powers conferred
 upon him by the Telegraph Acts 1863 to 1911, and not by virtue
 of any agreements between your Council and the Telephone
 Company." I think that states the result in an accurate and legal
 way.

It follows, of course, that I cannot give the relief for the
 alleged overpayment, or payment under protest by the county
 officials.

The Solicitor-General not pressing for costs has relieved me
 from some embarrassment on that point, and I accordingly dismiss
 the action without costs.

Solicitor for plaintiffs: *W. J. Shannon.*

Solicitor for defendant: *E. R. Bate.*

C. N. K.

FINLAY, APPLICANT; GUARDIANS OF TULLAMORE
UNION, RESPONDENTS (1).

Appeal.
1914.
Feb. 26.

Employer and workman—Contract of service—Relation of master and servant—Employee of Board of Guardians appointed subject to approval of Local Government Board—"Accident"—Workman employed in removing sewage contracting typhoid fever—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 60), s. 1, sub-s. 1, s. 13.

A workman employed by a Board of Guardians, who have the right of directing him in his work and of dismissing him at their own pleasure, and who are liable to pay his wages, is a servant of such Board within the Workmen's Compensation Act, 1906, although the appointment of such workman by the Board of Guardians, and the amount of his wages, require the approval of the Local Government Board.

Doran v. Guardians of Waterford Union (37 I. L. T. R. 158) approved of, *Murphy v. Guardians of Enniscorthy Union* ([1908] 2 I. R. 609), and *In re National Insurance Act, 1911, Officers of South Dublin Union* ([1913] 1 I. R. 244) distinguished.

A workman was employed as a machinery attendant, and part of his duty consisted in removing sewage out of the machinery. After having been engaged several years in this employment he contracted typhoid fever, of which he died. Medical evidence was given that he might have acquired the disease by handling the sewage, but no evidence was given that the removal of the sewage was the cause of the disease.

Held, that the evidence did not establish that the death resulted from an accident in the course of the employment, and that there was no right of compensation under the Workmen's Compensation Act, 1906.

APPEAL by the applicant from an order of the county court judge of King's County, dismissing an application for compensation under the Workmen's Compensation Act, 1906.

The appeal was based on the ground that the learned county court judge had misdirected himself in point of law in holding that as the deceased workman was employed under a board of guardians, the relation of workman and employer did not exist

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between him and such board within the meaning of the aforesaid Act. There was also a cross-appeal by the respondent board of guardians on the grounds (1) that the county court judge had misdirected himself in point of law in holding that there was an "accident," within the meaning of the said Act; (2) that the death of the deceased workman did not result from an accident arising out of and in the course of his employment; (3) that there was no evidence to support such finding.

Mary Anne Finlay, the applicant, was the widow of the deceased Daniel Finlay, who had been employed for several years under the respondent board of guardians as a boiler and machinery attendant. It appeared from the notes of the county court judge that the deceased man came home ill on the 27th May, 1913; and, upon medical advice, was taken to the hospital the following day, where it was ascertained he was suffering from typhoid fever, and that he died in hospital on the 6th June, 1913. The machinery of which the deceased had charge was used in connection with the pumping and ejection of sewage matter, and it was part of the duty of the deceased to clear out the ejector when it got choked, as it frequently did, with rags and other matters passing through the machinery. When engaged in so clearing out the machinery the workman necessarily came in contact with the sewage. There was no further evidence pointing to any event during the work from which it might be inferred that a typhoid microbe from the sewage had entered his system. A medical witness stated that the deceased might have contracted typhoid fever by handling the sewage.

The county court judge was satisfied that the deceased contracted the typhoid fever "by reason of a typhoid microbe emanating from the sewage matter coming in contact with his person, and so entering his system"; and he held that there was an "accident" within the meaning of the statute, but refused the application for compensation upon the ground that he was bound by the decision in *In re National Insurance Act, 1911 (Officers South Dublin Union)* (1), following *Murphy v. Guardians of Ennis-corthy Union* (2), to hold that the relation of master and servant

(1) [1913] 1 I. R. 244.

(2) [1908] 2 I. R. 609.

did not exist within the meaning of the Workmen's Compensation Act, 1906, between the board of guardians and such a workman. *Appeal.*
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W. G. Shannon, for the appellant :—

In re National Insurance Act, 1911 (Officers South Dublin Union), (1) was decided on the construction of different words in a different statute; the question in that case was whether there was a "contract of service" between the guardians and the officers of the union. *Murphy v. Enniscorthy Union* (2), on which *Re National Insurance Act, 1911 (Officers South Dublin Union)*, (1) appears to be based, was a decision on the employment of officers of a different character from the deceased workman in this case. The applicant in *Murphy's Case* (2) was a dispensary doctor; his contract of service, the control exercised over him, the nature of his duties, which were statutory, and the time in which he might discharge them, are all quite different from the conditions governing the service of menial servants like the deceased workman in this case: *Simmons v. Heath Laundry Co.* (3); *McCarthy v. Guardians of South Dublin Union* (4); *Doran v. Guardians of Waterford Union* (5).

Littledale, K.C. (with him *F. F. Denning*), for the respondents :—

Even assuming that the deceased was employed within the meaning of the Act, which we do not admit, we say there was no accident. There is nothing pointing to any event that could be described as an accident; unless the disease is a scheduled one there must be an accident of which notice could be given: *Eke v. Hart Dyke* (6); *Broderick v. London County Council* (7); *Martin v. Manchester Corporation* (8); *Robson, Eckford, & Co., Ltd. v. Blakey* (9).

The deceased was not in the employment of the guardians; they had only the power of selecting him from all the

(1) [1913] 1 I. R. 244.

(2) [1905] 2 I. R. 609.

(3) [1910] 1 K. B. 543.

(4) 1 I. R. 2 C. L. 97.

(5) 37 I. L. T. R. 158.

(6) [1910] 2 K. B. 677.

(7) [1908] 2 K. B. 807.

(8) 106 L. T. R. 741.

(9) 5 B. W. C. C. 536.

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applicants; the Local Government Board must approve and confirm his appointment. Moreover, the guardians could not dismiss him or even increase his salary without the approval of the Local Government Board. The guardians are in the position of statutory employers having power to give instructions. [He referred to *Brintons, Ltd. v. Turvey* (1); *Steel v. Cammell, Laird, & Co.* (2); *Fenton v. Thorley & Co.* (3); *M'Guigan v. Guardians of Belfast Union* (4); *Dunbar v. Guardians of Ardee Union* (5).]

W. G. Shannon, in reply, referred to *Sheerin v. Clayton & Co.* (6).

O'BRIEN, L.C. :—

This case has occupied the day in argument, but it has not occupied one minute longer than its importance justifies, for of the two questions that arise in connection with it, one at least is of very general importance.

The poor fellow whose death has given rise to the claim was employed by the guardians of the Tullamore Union for many years in connection with the working of an ejection suction-pump, which was used to discharge the sewage from pipes or drains for the purpose of irrigating a farm which the guardians carried on. It appears that it was a constant thing for this ejector to get choked by reason of the presence of little pieces of rags, or matters of that sort, which got into the sludge. When that took place it was the duty of this man to clear the ejector, and thereby, necessarily, he had to handle the sewage; and that was an act he had had to perform many times during the years he was employed by the guardians, and came within his ordinary duty.

These are really all the material facts relating to his employment. On the 27th May he came home, and complained of being ill. On the 28th May he went to hospital, and it was found he was suffering from typhoid fever, and subsequently he died. The suggestion that is made on behalf of his widow is, that he

(1) [1905] A. C. 230.

(4) 18 L. R. Ir. 89.

(2) [1905] 2 K. B. 232.

(5) [1897] 2 I. R. 76.

(3) [1903] A. C. 443.

(6) [1910] 2 I. R. 105.

contracted the fever by reason of his having at some previous date which is not fixed, while handling the sewage, come into contact with typhoid germs.

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Two questions arise, the first of which is a very important one. It was argued that, upon the supposed existence of a decision of this Court, this man, who was working for the board of guardians, who are controlled by general statutes and orders of the Local Government Board, could not be considered as "employed" by them; that they could not be his employers within the meaning of the statute. The learned county court judge was of opinion that he was bound by a decision of the Master of the Rolls to hold that such was the case, that learned judge having, in the view of the county court judge, judicially put a construction on a decision of this Court which required him to decide that the man was not employed by the guardians. The effect of upholding the view of the county court judge might be to sweep out of the Workmen's Compensation Act all the employees of the boards of guardians in the country, who would be otherwise ordinary workmen, although from the popular point, of view they occupy the same position exactly as the employees of any ordinary employer.

The position of this class of servant has been very clearly considered and determined by Mr. Justice Andrews, in the case of *Doran v. Guardians of Waterford Union* (1). He carefully dealt with all the general sections of the Order which would apply not only to that, but to the present case (General Order, Local Government Board, December, 1882). He comments on the fact that the jury there found that the porter, the assistant-master, and the ward-mistress, when they committed a certain tort, were the servants of the guardians; and then he says: "Notwithstanding the control vested in the Local Government Board as successors of the Commissioners, I therefore think that it not only was open to the jury to find that Donnelly, Phelan, and Power were, but that they unquestionably were, servants of the guardians, and that the guardians were their masters, by whom they were appointed and paid and could be

Appeal. dismissed." Now that was the opinion of Mr. Justice Andrews, and
 1914. of the Court of King's Bench, which consisted of Mr. Justice Gibson,
 FINLAY Mr. Justice Andrews, and Lord O'Brien, L.C.J., and I do not
 v. think it was ever seriously considered that that was not an accurate
 GUARDIANS statement of the law until such a suggestion was made in another
 OF case which came before the Master of the Rolls, *In re National*
 TULLAMORE UNION. *Insurance Act, 1911 (Officers of the South Dublin Union)* (1),
 O'Brien, L.C. where it was urged that the decision was inconsistent with a
 decision of this Court.

The case in which the Court of Appeal is supposed to have decided that all these inferior officers were not servants of the guardians is *Murphy v. Guardians of Enniscorthy Union* (2), and for myself I cannot see that the Court of Appeal laid down any such proposition. That was a case where a dispensary doctor was sought to be brought within the Workmen's Compensation Act. He is appointed subject to the approval of the Local Government Board; he cannot be removed by the board of guardians; he can only be removed by the Local Government Board; he is not subject to the guardians. He discharges statutory functions relating to the relief of the poor, and some special matters connected with the committal of lunatics independent of the guardians; and, that being the tenure of his office, it was suggested that he was a servant of the guardians, and the Court of Appeal, in a very short judgment disposed of the case. Let us see how that could apply to the inferior officers, the officers held by Mr. Justice Andrews to be servants of the guardians. No doubt the inferior officer's appointment has to be sanctioned by the Local Government Board, but once appointed he is exactly in the same position as any ordinary workman with regard to the orders he must obey in carrying out his duties. He is not like a high official, such as a doctor, having statutory duties independent of the guardians imposed upon him; he must act as directed by the guardians, and if he disobeys their orders he can be dismissed by them. He is paid his wages by them, and it would be ridiculous to say that if they did not pay him his wages he could not sue for the recovery of them in an ordinary civil bill, as he certainly could not

(1) [1913] 1 I. R. 244.

(2) [1908] 2 I. R. 609.

sue the Local Government Board. Were it not for the supposed effect of the Master of the Rolls' decision, I should not have thought the question admitted of doubt; but, with regard to this decision, it is enough to say that the case before him arose under a different statute, and the difficulty which the Master of the Rolls decided to exist has been since dealt with by statute. Accordingly, on the first branch of the case, I think it is quite clear that the learned county court judge was not bound to hold that this man was not a workman coming within the statute.

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That disposes of the question of the position of workmen of this class serving under guardians of the poor, and so far the appellant has succeeded.

But then comes another question, arising on the cross-appeal, upon which, in my judgment, the appellant must fail. The position of a workman is, in most cases where he sustains injury, easily ascertained. Something, some event the actual happening of which can be affirmatively proved, happens, and from that occurrence one can certainly trace the injury that he has sustained. But when we are dealing with a man who contracts disease during the time he is employed, then the provisions of the statute and its construction seem to me to require the application of principles which, I think, are clearly stated by the Court of Appeal in England, and also by the House of Lords. I am, of course, dealing with cases of disease other than those expressly legislated for by sect. 8 of the Act of 1906. I take the words of the Master of the Rolls in *Broderick v. London County Council* (1) at page 810, where, quoting from a previous judgment of his own, he says:—"Although I do not like at any time to refer to my own judgment, I there stated what I venture now to repeat—it is not enough to say that the injury arises out of and in the course of the employment. Injury by disease alone, not accompanied by accident, is expressly excluded, as pointed out by Lord Macnaghten in *Fenton v. Thorley & Co.* (2). It must be made out not merely that there is injury arising out of and in the course of the employment, but injury by accident arising out of and in the course of the employment." And the explanation of the Master of the Rolls of the

(1) [1908] 2 K. B. 807.

(2) [1903] A. C. 443, at p. 448.

Appeal. singular anthrax case (*Brinton's, Limited v. Turvey* (1)) is that in
 1914. that case there was not only the contracting of a certain disease
FINLAY while the employee was in the service of an employer, but that
v. there was something in the nature of a proved accident which
GUARDIANS introduced the disease into the body of the workman, from which
OF disease he died. That is the explanation which the Court of
TULLAMORE Appeal gives of the anthrax case. And in the same judgment,
UNION. where he refers to the lead-poisoning case, *Steel v. Cammell, Laird, & Co.* (2), he says:—"That was a lead-poisoning case, in which Mathew, L.J., said: 'The man was following a dangerous occupation, because it might involve the risk of lead-poisoning. But the evidence shows that, in the majority of cases, the workmen would not be affected, though there is a minority in which the injury is sure to arise, and when the lot fell on a particular individual, it could not be said that the case was unexpected, or fortuitous, or unseen.'"

Now, if the argument on behalf of the applicant in this case is right, it would be sufficient for him to prove a contract of service, and the fact that he had acquired the disease, and that he *might* have acquired that disease—without anything more—by reason of something he had to do in connection with his employment. I think all the authorities are against that proposition: *Broderick v. London County Council* (3) and *Martin v. Manchester Corporation* (4), to refer only to two. They are clear authorities negating the proposition put forward by the applicant. True it is that Dr. Morrison, in reply to a curious question addressed to him by the judge, stated that the deceased man may have contracted typhoid fever by handling the sewage; but that is not enough. There is nothing in the evidence to show at what time this man did handle this sewage. He had to handle it from time to time. It was a thing that might or might not give him such a disease. I have a great deal of sympathy with the applicant, but one must decide according to law, and, accordingly, I am of opinion that the learned county court judge's view, that the facts proved the occurrence of an accident, cannot be supported, but in the result his decision is confirmed.

(1) [1905] A. C. 230.

(2) [1905] 2 K. B. 232.

(3) [1908] 2 K. B. 807.

(4) 106 L. T. R. 741.

HOLMES, L.J. :—

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I concur on both branches of the case. The first branch was one in which the learned county court judge felt himself bound by the authority of a decision of the Master of the Rolls. I cannot see how that decision at all governs the present case. It is under a different statute. Here the person who lost his life was employed by a board of guardians for the purpose of attending to a boiler—he is called a boiler-man—and one of the things that it was necessary for him to do was to remove sewage in certain circumstances when the machinery got choked. It was not a particularly elevating occupation, and the amount of pay was not very large. But the question that has been raised comes to this was he the servant of anyone, or was he his own master? Let us see what his position was. He was engaged to do this work for the board of guardians. They selected him from three or four other applicants as their servant, but it was necessary for them to obtain the concurrence of the Local Government Board in that matter, and also in the amount of his pay. They obtained that. And once they obtained that concurrence I do not see what he could be called except their servant, they paying his wages and he being under their direction. Therefore, so far as this part of the case is concerned, I look upon it as one of master and servant, with all the conditions and liabilities created by the statute.

But there is a cross-appeal which raises another question. Finlay, during the nine years in which he was in this position, was in the habit of looking after this boiler, and from time to time—very frequently, as I would gather from the evidence—was obliged to remove certain quantities of sewage, and during that time it is not suggested that he suffered any disease. But upon one occasion he came home to his own house and told his wife that he was feeling ill, and that it would be necessary to remain away from his work for that day. He saw a doctor in the course of the afternoon, and went into hospital the next day, and it was found that he was suffering from typhoid fever; and shortly afterwards he died. So far there is nothing to suggest that his death was the result of an accident. The only accident suggested is that he was engaged in the ejection or removal of the sewage, and that

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it was possible that this may have been the cause of the disease that caused his death. But there is no evidence to show that the removal of the sewage was the cause of the disease, and from the evidence given in the case it might have arisen from other causes. Under these circumstances it appears to me that the applicant has failed to prove that this death arose from an accident in the course of his employment. The authorities are very strong, and one of the strongest appears to be the section that is introduced into the Act of 1906. The previous Act had been in operation for a considerable number of years, and one of the defects that arose was that a man might be carrying on an employment which beyond doubt was likely to bring on disease; and yet, according to the law as it then stood, no compensation could be recovered. The lead-poisoning case illustrates this defect, *Steel v. Cammell, Laird, & Co.* (1). In that case the man was engaged constantly handling lead, and it was held that it could not be said that the disease from which he suffered was the result of an accident, although it was the result of working with the lead. That was the decision before the Act of 1906. For the purpose of altering the law in this respect there has been introduced into the Act of 1906 a provision by which, if a person suffers from a specified disease and is engaged in a specified employment, then, without any evidence that the disease is the result of the employment, it is to be assumed to be such. There is a power given in the statute to extend the list therein contained, but the existing list does not include the present case. The fact that that section has been introduced into the Act of 1906 convinces me that the law remains the same in other respects as it was before the Act.

I have come to the conclusion that the decision should be against the applicant in the present case, and therefore it is really coming to the same conclusion as the county court judge came to, but on different grounds.

CHERRY, L.J., concurred.

Solicitor for appellant: *Thomas Conway.*

Solicitors for the respondents: *Hoey & Denning.*

J. M.

THE KING (WALSH) *v.* CASEY (1).K. B. Div.
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May 18.

Local Government—Election—Nomination paper—Validity of—Name of candidate—Misnomer—County and Rural District Councillors (Ireland) No. 2 Election Order, 1899, Rules 4 (2) and 32—Mandamus.

A candidate for election as rural district councillor described himself in his nomination paper as Michael B. Walsh, the name in which he appeared in the register of voters, and which he always assumed, and signed in transactions requiring his signature. His mother's name was Barry, and he had added the initial "B," to the christian name Michael, to distinguish him from others in the district named Michael Walsh. The deputy returning officer rejected the nomination paper on the ground that it did not comply with the terms of Rule 4, sub-rule 2, of the County and Rural District Councillors (Ireland), No. 2, Election Order, 1899, by setting out the surname and other name or names in full.

Held, that under the circumstances the name of the candidate was properly stated in accordance with Rule 4, sub-rule 2, of the Election Order of 1899; that, even assuming there was a misnomer, it was cured by Rule 32 of the said order; and that a peremptory writ of mandamus should issue to the deputy returning officer directing him to include the prosecutor's name in the list of candidates validly nominated.

Reg. v. Plenty (L. R. 4 Q. B. 346) followed.

Mather v. Brown (1 C. P. D. 596) distinguished.

MANDAMUS.

The prosecutor was a candidate for the rural district councillorship for the Farrahy electoral division in the rural district council of Mitchelstown, county Cork. In his nomination paper he gave his name as "Michael B. Walsh"; and the defendant, the deputy returning officer, declared the nomination invalid on the ground that it did not state fully the christian names of the candidate. The prosecutor made an affidavit from which the following statements are taken:—His name appeared as "Michael B. Walsh" in the register of voters. All his letters were addressed to him in that name; this was the name that appeared on cheques to him from the creamery, and he endorsed them in that name. His rent receipts

(1) Before KENNY and MOLONY, JJ.

K. B. Div. were in the name of "Michael B. Walsh," and all his transactions, 1914. whether of a private or business nature, were carried out in the same name; he signed his marriage deed as "Michael B. Walsh," and he obtained a Board of Works loan in that name. His full name was Michael Walsh; but as there were several others of the same name in the neighbourhood, he added the letter "B" to his name to distinguish him from them. He was personally acquainted with the vast majority of the electors of the division, and he believed that they all knew him as Michael B. Walsh, and he was so known to the deputy returning officer. On the 21st April, 1914, his nomination paper, in which he was described as "Michael B. Walsh," was lodged with the deputy returning officer, there being four candidates nominated for two vacancies. A few days later, the deputy returning officer, who was of different political opinions from him, and a personal friend and supporter of the other candidates, sent him notice saying that his nomination was invalid, as his surname and other name or names were not stated in full. In the meantime he had had an interview with the defendant, in the course of which Mr. Casey asked him, "Why did you take B.?" He replied that it appealed to him, as his mother's name was Barry, and the defendant said, "Why not sign Barry, and you would be all right?" He said he could not conscientiously do so, as his name was not Michael Barry Walsh but Michael B. Walsh, by which he had been known since his boyhood.

The defendant made an affidavit to the following effect:—He did not even know of the existence of the prosecutor till he got his nomination paper. He knew nothing about the politics of the prosecutor, and so far as he personally was concerned, he did not interfere in politics, and he was not supporting any candidate in the district. The prosecutor was entirely in error in suggesting that he acted through politics or friendship. When he examined the paper, he noticed that it was apparently invalid by reason of Rule 4 of the Election Order of 1899, and the cases referred to in the foot-notes in Vanston's Local Government, vol. i, p. 207, viz., *Mather v. Brown* (1) and *Henry v. Armitage* (2). He sent a copy of the

(1) 1 C. P. D. 596.

(2) 12 Q. B. D. 257.

nomination paper to Mr. J. Healy, the returning officer for the county, and asked his opinion, as he did not like to decide the matter without his assistance. When the prosecutor called upon him, he read for him the decision in *Mather v. Brown* (1) from Vanston. He made it clear to the prosecutor that had he been described either as Michael Walsh or Michael Barry Walsh he would have accepted the nomination paper as valid. From inquiries he then made he was informed and believed that the prosecutor was commonly known as Michael Barry Walsh. He was well aware that the name of Walsh, with the christian name of Michael, was exceedingly common in the Farrahy electoral division, and consequently he submitted that he was justified in believing that Michael B. Walsh was not a sufficient description of the candidate. On April 24th he received the opinion of the returning officer, in which he advised that—"The case, of course, is on all fours with that of Mather in *Mather v. Brown*" (1). On that advice he declared the nomination in question invalid, and in so deciding he acted perfectly bona fide.

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The prosecutor asked for a peremptory writ of mandamus directing the deputy returning officer to include his name in the list of candidates validly nominated for election as rural district councillors for the Farrahy electoral division, and to make out all such notices and documents and do all such acts as might be necessary for him by law to do in the case of a candidate who had been validly nominated.

Serjeant M'Sweeney, K.C., and H. Moloney, for the prosecutor:—

The deputy returning officer appears to have overlooked the effect of Rule 32 of the Election Order of the 16th February, 1899. Even if the prosecutor's name is Michael Barry Walsh, the nomination signed by him in the name of Michael B. Walsh is, according to Rule 32, valid. That rule states that "no misnomer or inaccurate description of any person or place named in any notice or nomination paper under this order shall hinder the full operation of such notice or paper with respect to that

(1) 1 C. P. D. 596.

K. B. Div. person or place, provided the description of that person or place
 1914. is such as to be commonly understood." The prosecutor was
 REX commonly known by the name of Michael B. Walsh ; but assum-
 (WALSH) ing that his name is Michael Barry Walsh, this is a misnomer
 v. which is cured by Rule 32 : *Reg. v. Plenty* (1). In that case it was
 CASEY. held that the description of a person by the initial of his christian
 name instead of the christian name was a misnomer capable of
 being cured by sect. 142 of the Municipal Corporations Act, 1835
 (5 & 6 Wm. 4, c. 76). That section, which corresponds with
 sect. 241 of the Act of 1882 (45 & 46 Vict. c. 50), is, with the
 necessary modifications, reproduced in Rule 32. *Mather v.*
Brown (2) does not apply, because that case had to be decided
 independently of any misnomer section. Where a duty is imposed
 by statute upon a returning officer, the Court will grant a
 mandamus compelling him to perform that duty : *Reg. v.*
Stewart (3) ; and in this case mandamus is the only effective
 remedy. We ask that under Order LXXXIV, Rule 37, the writ
 of mandamus should be peremptory in the first instance. A
 petition after the election would be no advantage to the prosecutor,
 inasmuch as the Court could not order a new election.

A. F. Coughlan, for the defendant :—

Considering that there were in the division several voters of
 the name of Michael Walsh, the deputy returning officer was
 justified in rejecting the nomination paper. He, however, sub-
 mits himself unreservedly to the Court.

KENNY, J :—

This is an application on behalf of the relator, Michael
 B. Walsh, for a writ of mandamus to issue to a Mr. Casey,
 of Mitchelstown, as deputy returning officer for the forthcoming
 election for the rural district council in the Mitchelstown rural
 district, directing him to include the name of the relator in the
 list of candidates validly nominated for election as a rural district
 councillor for the Farrah electoral division of the rural district,

(1) L. R. 4 Q. B. 346

(3) [1898] 1 Q. B. 552

(2) 1 C. P. D. 596.

and to make out all such statements and post all such notices and documents and do all such acts as may be necessary for him by law to do in the case of a candidate who has been validly nominated.

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Kenny, J.

There are two questions for consideration—(1) whether in the nomination paper lodged on behalf of the said Michael B. Walsh, “the surname or other name or names” of the said Michael B. Walsh have been properly stated; and (2) whether, if not properly stated, the defect is cured by what is called the misnomer section of the Election Order, 1899?

On the first point there is some controversy. In his marriage settlement the relator signed his name as Michael B. Walsh; in the register of voters his name appears as Michael B. Walsh; in an insurance policy the name is similarly given; in cheques drawn by him, and in all other transactions requiring his signature, this was the name he always assumed and signed. Mr. Casey says that the relator told him that his mother’s name was Barry, and that he had adopted the name to distinguish him from others in the district named Michael Walsh.

On the evidence we hold that the relator is known in the district as Michael B. Walsh. Even if his full name is Michael Barry Walsh, he is entitled to call himself Michael B. Walsh, and has done so for many years; and that description has been such as was commonly understood to designate the relator. The name in the nomination paper is given exactly as it appears in the list of voters, and, under the circumstances, we are satisfied that it is properly stated in accordance with Rule 4, sub-rule 2, of the Local Government Election Order of February 16th, 1899. But assuming that there is a misnomer and that the name should have appeared as “Michael Barry Walsh” in the nomination paper, we are of opinion that Rule 32 of the same Order cures the defect. That rule is as follows:—“No misnomer or inaccurate description of any person or place named in any notice or nomination paper under this order shall hinder the full operation of such notice or paper with respect to that person or place, provided the description of that person or place is such as to be commonly understood.” I think if the deputy returning officer’s attention had been directed to that rule, he would have

K. B. Div. come to the conclusion that it applied. He merely read the head-note of *Mather v. Brown* (1), as given in Vanston's Local Government, vol. i, p. 207, and was, I think, misled by the statement there appearing that "Robert V. Mather" did not sufficiently state the names of one Robert Vicars Mather, and that, therefore, the nomination paper was bad. The Act of Parliament enabling misnomers to be cured did not apply in that particular case, and therefore the judges had to decide it in the absence of the section which is the equivalent of our Rule 32. In *Reg. v. Plenty* (2), decided before *Mather v. Brown* (1), a misnomer section, similar to the rule in the present case, was considered; and it was held that the designation of a person by the initial of his christian name, instead of the full christian name, was a misnomer, but that the defect was cured by sect. 142 of the Municipal Corporations Act of 1835. Having regard to that case, I am clearly of opinion that the misnomer rule applies, and that the nomination paper ought to be considered as perfectly good and valid. We therefore grant the application.

There remains the question of costs. I think a rather unfair attack has been made upon the deputy returning officer. It is suggested that in rejecting the nomination paper he was influenced by political views, that he was a friend of other candidates, and wanted to reject the relator's paper. The deputy returning officer says he did not even know the relator at the time, and he negatives, to our satisfaction, the suggestion that he was influenced by political or other improper motives. As a matter of fact, before finally rejecting the paper he consulted Mr. Healy, the returning officer. We will not, therefore, give costs against him, but will allow the parties to abide their costs.

MOLONY, J., concurred.

Solicitor for the prosecutor: *J. G. Skinner.*

Solicitor for the defendant: *D. Casey.*

C. L.

(1) 1 C. P. D. 596.

(2) 1 L. R. 4 Q. B. 346.

THE KING (MURPHY) v. THE JUSTICES OF CORK (1). *K. B. Div.*

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Justices—Summary jurisdiction—Complaint dismissed—Evidence on behalf of defendant improperly admitted notwithstanding objection by complainant—Refusal of justices to state a case—Mandamus—Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43).

April 20, 21.
May 1.

Where justices have dismissed a complaint, the Court will not grant a mandamus to compel them to state a case on the ground that evidence tendered on behalf of the defendant, and objected to by the complainant, was improperly admitted, the evidence given on behalf of the complainant being such as would have justified the justices in dismissing the complaint.

APPLICATION for a rule to compel justices to state a case.

The prosecutor was complainant in a summons issued against the Right Hon. Henry O'Shea, Lord Mayor of Cork, charging him with having, contrary to the provisions of the Local Government (Application of Enactments) Order, 1898, acted as a member of the Council of the County Borough of Cork on June 27th, 1913, when he was disqualified so to act by reason of his being an alien. The complaint was heard before the justices of the borough of Cork on the 7th January, 1914, when evidence was given to the following effect:—

The defendant had been elected as councillor of the said county borough in 1899, and as alderman in 1909; he was elected Lord Mayor on the 14th January, 1911, and held that office for nine days. On the 19th April, 1912, he was again elected Lord Mayor, and had since that date held the office. He presided at the meeting of the council on the 27th June, 1913, and voted twice on that occasion.

Patrick Crowley, a registration agent, deposed that he remembered having had a conversation with the defendant about nine years ago; that on that occasion the defendant told him he was a naturalized American citizen; that he had got out his naturalization papers, and that he had voted as a

(1) Before CHERRY, L.C.J., and KENNY and DODD, JJ.

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naturalized citizen of the United States. Since then the defendant had repeatedly told him that he was an American citizen. The only other evidence against the defendant was a copy, certified by the Under-Secretary of State, of a certificate of re-admission to British nationality granted by the Home Secretary on the 10th September, 1913, to the defendant. The certificate was in the following terms:—

“Whereas Alderman Henry O’Shea, Lord Mayor of Cork, has presented to me the Right Honourable Reginald M’Kenna, one of His Majesty’s Principal Secretaries of State, a memorial praying for a certificate of re-admission to British Nationality, and alleging that he was a natural-born British subject, and that he became an alien by being naturalized as a citizen of the United States of America on November 8th, 1887, . . . and that in the period of eight years preceding his application he has resided for five years within the United Kingdom, and intends, if he receives the certificate of re-admission to British nationality for which he prays, to reside in the United Kingdom. And whereas I have inquired into the circumstances of the case, and received such evidence as I have deemed necessary for proving the truth of the allegations contained in such memorial, so far as the same relate to the memorialist. And whereas the said Henry O’Shea has taken the oath of allegiance. Now, in pursuance of the authority given to me by the said Act [the Naturalization Act, 1870], I grant to the aforesaid Henry O’Shea this certificate, and declare that, as from the date of this certificate, but not in respect of any previous transaction, he is hereby admitted to the status of a British subject, with the qualification that within the limits of the foreign State of which he became a subject he shall not be deemed to be a British subject unless he has ceased to be a subject or citizen of that State according to the laws thereof, or in pursuance of a treaty to that effect. In witness whereof I have hereunto subscribed my name this 10th day of September, 1913. (Signed), R. M’Kenna.” This was certified by C. E. Troup, Under-Secretary of State, to be “a true copy of a certificate of re-admission to British nationality granted to Henry O’Shea.”

For the defendant evidence was given showing that he went to

New York in 1879 or 1880, and remained there till 1889. The American consul at Queenstown, whose evidence was objected to by the prosecutor's solicitor, proved that for an alien resident in America to become an American citizen he should, not less than three years after his arrival in the United States, appear before the Court, and make a formal declaration of his intention of becoming an American citizen; that the next step was that after a further period of two years and not more than seven, the alien had to file a petition in Court applying for citizenship; that after the petition had been granted the oath of allegiance had to be taken before the clerk in open Court, and that the clerk of the Court then issued a certificate, of which a duplicate copy was forwarded to the Department of Naturalization and Commerce at Washington, a third copy remaining in Court as a permanent record. This witness further proved that for the purpose of admission to citizenship there were only two Courts in New York, viz., the Superior or Common Pleas Court for the City and County of New York, and the United States District Court, which was for the State of New York, including the City of New York, and that any person naturalized in New York would have the fact recorded in one or other of these two Courts. The consul was not a lawyer. Two certificates by the clerks of these Courts were then received in evidence by a majority of the justices, who overruled the objection of the prosecutor's solicitor. These documents certified that there was no record of the naturalization of the defendant from January, 1879, to January, 1892. On this evidence the majority of the justices dismissed the summons. The prosecutor asked the magistrates to state a case, but they refused to accede to the application.

A conditional order for a rule directing the justices to state a case having been obtained, nine out of the twelve magistrates who tried the case made an affidavit stating that they were not satisfied with the statements of Patrick Crowley, and did not accept them as being a true and accurate account of his alleged interviews with the defendant. In cross-examination he admitted that the conversation was of a most casual kind; he was unable to say whether or not the defendant had not stated that he had signed papers declaring merely his intention to become an

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American citizen. The American consul had satisfied them that he had a thorough knowledge of the law of naturalization in the United States, and that he was quite competent to give evidence of that law. They were of opinion that the two certificates put in evidence on behalf of the defendant were the only possible evidence of the records of the two New York courts; they were satisfied by these certificates, and found, as a matter of fact, that the defendant had never become a duly naturalized citizen of the United States of America. They were also of opinion that the defendant applied for the certificate of re-admission to British nationality at a time when he was under a misapprehension as to his true legal position, and when he wrongly supposed that his residence in New York, coupled with his intention to become a citizen of the United States, had operated to make him a naturalized American. When the application to state a case was made to them, they were of opinion that the matters in issue were exclusively questions of fact, and that, therefore, the application ought not to be acceded to.

Serjeant Sullivan, K.C. (with him *M. F. Healy*), for the prosecutor:—

Magistrates have no right to refuse to state a case, except on the ground that the application is frivolous. Having ruled against the prosecutor on evidence not legally admissible, the magistrates here try to maintain that they decided the case on questions of fact. The certificate granted by the Home Office to the defendant was issued under sect. 8 of the Naturalization Act, 1870 (33 Vict. c. 14). That section deals with statutory aliens; that is, natural born British subjects who have become aliens. We rely on the certificate granted by the Home Office as an admission that in September the defendant was a statutory alien; and we submit that proof of the status in September is conclusive evidence of the status in the previous June. Sect. 11 of the Act enables the Home Office to make regulations, and in the *Encyclopædia of Forms*, vol. ix, p. 10, the regulations made in pursuance of the statute are set out. Under sect. 12, sub-s. 3, a certificate of re-admission to British nationality may be proved by the production of a certified copy thereof. A person's own admission is the best

possible evidence against him: *The Queen v. Sullivan* (1) at p. 565. *K. B. Div.*
 According to that case the magistrates were, we submit, bound to 1914.
 convict. The magistrates irregularly admitted two certificates of
 search in the New York courts, holding that they were complete
 disproof of the overwhelming *prima facie* case made by the
 prosecutor. When there is no rebutting evidence, the magistrates
 cannot refuse to act on the legal evidence before them. The
 consul was not a person entitled to give expert evidence as to the
 American law of naturalization. A witness is not accepted as
 competent to prove foreign law unless he possesses special know-
 ledge of the subject in question, derived from practical experience.
 Knowledge acquired by study alone is not a sufficient qualifica-
 tion, but it is requisite that the witness should have had
 experience as a judge or practising advocate in a Court in which
 the foreign law to be proved is administered, or have held some
 office or position in which he has become familiar with it:
Halsbury's Laws of England, vol. xiii, p. 488; *Phipson's Law of*
Evidence, 5th ed., pp. 364-5; *Bristow v. Sequeville* (2). Several
 issues of law have been raised by the findings of the justices
 upon which they should be directed to state a case, viz.:—
 (1) Whether the American consul was a person entitled to give
 positive evidence as to the American law of naturalization;
 (2) whether the justices improperly admitted the two certificates
 of search signed by the clerks of the New York Courts; (3) whether
 the justices were at liberty to take the statement in the certifi-
 cate issued by the Home Office as an admission by the accused
 that he was an American citizen in June, 1913; and (4) whether
 in the circumstances they were bound to convict.

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Ronan, K.C., and *J. A. Rearden*, for the Lord Mayor:—

The justices have confined themselves to findings of fact, and
 in such circumstances they should not be called upon to state a
 case. The superior Court does not put itself in the position of
 the justices in deciding on the weight or sufficiency of evidence,
 but accepts their finding upon facts within their jurisdiction as
 conclusive, whatever may be the opinion of the Court itself as to
 its value: *Paley on Summary Convictions*, 7th ed., page 329.

(1) 20 L. R. Ir. 550.

(2) 19 L. J. Ex. 289.

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 CORK. an opinion upon them, except only so far as they raise a point of
 law: *Barton v. Hannant* (1). Once the case, as here, reaches the
 stage at which the justices may either convict or acquit, the
 question for their determination becomes solely one of fact. A
 case can be stated only on a question of law: Summary Jurisdic-
 tion Act, 1857 (20 & 21 Vict. c. 43), sect. 2. Where justices
 convict, a case may be stated on the admissibility of evidence:
Dwyer v. Larkin (2); but in *Reg. v. Justices of Macclesfield* (3),
 where the accused had been convicted the Court refused a rule to
 compel the justices to state a case on the ground that evidence
 had been improperly admitted. *A fortiori* where they acquit on
 evidence improperly admitted an order compelling them to state
 a case ought not to be made. See also *Reg. v. Davey* (4). The
 only evidence against the defendant in this case was the admission
 made by him in the conversation with Crowley, and the justices
 have decided as a fact that they disbelieved that evidence. There
 remained the document from the Home Office; but the justices
 had before them no legal proof of the granting of that certificate.
 The original was not produced. What was put in evidence
 was a document purporting to be certified by an Under Secretary
 of State, but no evidence was given of his signature. No regu-
 lations authorizing him to issue a certified copy were produced.
 The Naturalization Act, 1870, does not say that the Documentary
 Evidence Act, 1868 (31 & 32 Vict., c. 37), shall apply to certificates
 issued under the former Act. Even assuming that the document
 was evidence, the justices could say they were not satisfied with
 it. A conviction on any evidence not legally admissible is bad,
 although there may be other evidence sufficient to warrant a
 conviction: *The Queen v. Gibson* (5). The document was not proof
 that the defendant was an alien in June; that was an inference of
 fact to be drawn from all the circumstances of the case before the
 justices. Where the case starts with a person originally of British
 nationality, the presumption is in favour of a continuance of that
 status until proof is given that it has ceased: *Scales v. Key* (6).

(1) 31 L. J. M. C. at p. 228.

(2) 5 New Ir. Jur. Rep. 25.

(3) 2 L. T. (N. S.) 352.

(4) [1899] 2 Q. B. 301.

(5) 18 Q. B. D. 537.

(6) 11 Ad. & E. 819.

No authority can be found in which the superior Court has remitted a case to justices with a direction that they should convict. *The Queen v. Sullivan* (1) is no authority for the proposition stated by Serjeant Sullivan. The Court cannot send a case back to the magistrates with a direction that they are bound to convict: *Greig v. Bendeno* (2); *Jones v. Cotterall* (3). This Court has no power to compel magistrates to state a case except on points of law which themselves determine the result.

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J. M. Fitzgerald, for the justices.

Healy, in reply.

Cur. adv. vult.

CHERRY, L.C.J. :—

May 1.

This is an application to make absolute a conditional order, dated the 19th day of February, 1914, directing the justices in the title named to state a case for the decision of this Court upon certain questions of law which, it is alleged by the prosecutor, arose on the hearing of a complaint on the 7th day of January, 1914, against the Rt. Hon. Henry O'Shea, Lord Mayor of Cork.

The summons setting forth the complaint against the Lord Mayor alleged that he, on the 27th day of June, 1913, being then disqualified to be a member of the council of the county borough of Cork by reason of his being an alien, did act as a member of the said council, contrary to the provisions of the Local Government (Application of Enactments) Order, 1898. If convicted on this charge, the Lord Mayor would be liable to a pecuniary penalty, and would be disqualified for a period of seven years from being a member of the council.

It was admitted at the hearing of the complaint that the Lord Mayor was a natural-born subject of the king; and it was proved that he went to America in or about the year 1879, and remained there until the year 1892, when he returned to Ireland. It was alleged by the prosecutor that when in America he had become a naturalized citizen of the United States, and that he had thereby become a "statutory alien" within the meaning of the Naturalization Act, 1870.

(1) 20 L. R. Ir. 550.

(3) 46 Sol. J. 396.

(2) K. B. & E. 133.

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No direct evidence of his naturalization was produced at the hearing. The prosecutor relied solely upon, 1, an admission by the Lord Mayor to one Patrick Crowley, who was produced as a witness, that he was a naturalized American citizen, and, 2, a certified copy of a certificate of re-admission to British nationality issued by the Home Secretary on the 10th of September, 1913.

Crowley, who was a revision agent, swore that he knew the Lord Mayor for twenty years, and that he remembered having had a conversation with him about nine years ago, in the course of which the Lord Mayor told him that he was a naturalized American citizen, that he had got out his naturalization papers in the United States, and that he had voted as a naturalized citizen there. He also said that he had repeatedly told him that he was an American citizen; but he did not give the dates of any of the subsequent conversations.

The certificate of re-admission to British nationality relied upon appeared to have been issued pursuant to the 8th section of the Naturalization Act, 1870. It recited that the Lord Mayor had presented a memorial to the Home Secretary, praying for the certificate, and alleging, among other things, that he was a natural-born British subject, and that he became an alien by being naturalized as a citizen of the United States of America, on the 8th October, 1887. By its operative part the certificate declared that as from its date (10th September, 1913), but not in respect of any previous transaction, the Lord Mayor was re-admitted to the status of a British subject, with a qualification that it is not necessary for me to refer to. The name of the Home Secretary (Mr. Reginald M'Kenna) appeared at the foot of the certificate; but the original document was not given in evidence; a copy thereof which purported to be certified by "C. E. Troup, Under Secretary of State," was alone produced. No evidence was given of the signature of the Under Secretary; nor were any regulations produced, authorizing him to issue a certified copy.

This was the entire evidence given on behalf of the prosecutor; and, upon it, I think it is quite plain that it was competent for the justices either to convict or (as they did) to dismiss the summons. As to the evidence of Crowley, it was admissible,

but not conclusive; and it was open to the justices to refuse to act upon it. Those of them who have sworn the affidavit which has been read have given what appear to me to be very good reasons for this refusal. To convict a man solely upon evidence of an admission made in a casual conversation with another nine years before would, to my mind, be highly inexpedient. No person could remember with accuracy the exact words used at that distance of time; and I think any judge would tell a jury in a criminal case that it would be dangerous to rely to any extent upon such evidence.

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The certificate of re-admission to British nationality does not, in my opinion, conclusively prove the prosecutor's case, any more than the evidence of Crowley does. Even if the certified copy was admissible in evidence without any proof, which I think is extremely doubtful, how does it prove that the Lord Mayor was an alien on the 27th of June, 1913, the date of the alleged offence? It implies, no doubt, that immediately prior to its issue the person to whom it was issued was an alien; but he may have become an alien between June and September. On a criminal charge, such as this is, it is necessary to prove the case conclusively. There is a presumption of law that a state of facts once proved to exist continues until some change is proved to have occurred, but there is no corresponding presumption that a state of facts has existed for any period anterior to the date when it is shown to exist. I quite admit that a jury, or any tribunal deciding questions of fact, might infer that a status which existed in September existed in the preceding June. But they might also lawfully, and properly, refuse to draw this inference.

Again, if the original memorial signed by the Lord Mayor himself, which is referred to in the certificate, had been produced, it would have been evidence against him as an admission. But it was not given in evidence, and the recital of it in the certificate is plainly only secondary evidence, upon which the justices ought not to have acted.

I have dealt at some length with the evidence for the prosecution, because it appears to me that if, on it alone, the dismissal of the complaint can be justified, it would be futile to bring up for discussion in this Court questions which may arise as to the admissibility of evidence tendered for the defence.

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The affirmative evidence given for the defence was shortly to the effect that the Lord Mayor, during his stay in America, had resided altogether in the City of New York; that according to the law of the United States, which was proved by the American consul at Queenstown, it was necessary for an alien seeking to be naturalized as an American citizen to file a petition in Court applying for citizenship; that on the petition being granted a certificate was issued to the applicant, a duplicate of which was filed in the local Court as a permanent record, and was indexed; and that there were only two Courts in New York in which this could be done. Certificates under the seal of both these Courts were given in evidence, stating that their records from January 1st, 1879, to January 1st, 1892, failed to disclose that Henry O'Shea (the Lord Mayor) had become a citizen of the United States.

All this evidence was objected to by the solicitor for the prosecution, but it was admitted by the justices. It was in reference to it that all the questions of law (except one) which the justices were asked to state for the determination of this Court arose. The question suggested, which was not connected especially with the evidence for the defence, was the general one, "Whether on the evidence the justices were bound to convict." This last question, however, is one which, as decided by this Court in *The Queen v. Sullivan* (1), should not be put to the Court, and ought not to be answered (see judgment of Palles, C.B., at p. 571). I certainly could not agree to an affirmative answer being given to it in the present case, whatever decision was arrived at as to the answers to the other questions suggested by Serjeant Sullivan. These questions involve many and difficult problems of law, and the hearing and determination of them would occasion considerable expenditure of both time and money. Even if the answers of the Court were altogether in favour of the prosecutor's view, and the whole of the evidence given on behalf of the defence was excluded, the original infirmity of the prosecutor's evidence would remain; and this, in my opinion, would justify the order which the justices have already made, by a large majority,

(1) 20 L. R. Ir. 550.

dismissing the summons. The hearing and decision of the case *K. B. Div.* 1914.

Under these circumstances are we bound to issue an order in the nature of a mandamus directing the justices to state a case? I do not think that we are. It is true that the section which requires justices to state a case upon questions of law is mandatory in its character; and they are bound to do so unless they consider the application frivolous. But it has always been held that this Court has a discretion as to making an order to compel justices to state a case. Where the determination of the real question at issue between the parties would not be affected by the answers to the questions suggested for consideration, an order ought not, in my opinion, to be made commanding them to state a case. This principle, to my mind, applies with peculiar force to a criminal charge of a serious character where the accused has been already acquitted by the justices. To convict a man simply because his counsel has tendered illegal evidence on his behalf would be contrary to all our notions of natural justice; and if we were to accede to the prosecutor's contentions in this case, we should be going very near doing so.

The Court is here asked, practically, to quash an acquittal merely on the ground that improper evidence was received in support of it. If we refuse, as I think we ought, to do so, we shall be supported in our decision by English authorities very much stronger than this case.

In *Reg. v. Justices of Macclesfield* (1), the Court refused a rule to justices ordering them to state a special case for the opinion of the Court, where the objection was that they improperly received evidence, and the accused was convicted, holding that it was necessary to show that the conviction was wrong in point of law. "The Court," said Crompton, J., "cannot interfere in every case where justices have admitted improper evidence as it does in granting rules for new trials; although that determination might be wrong, there may have been other evidence justifying the conviction." If the Court may act in this manner in case of a conviction, surely it follows that it ought to do so in the case of an acquittal.

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(1) 2 L. T. (N. S. 352.

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A more recent case, which appears to me strongly to support the view which I take of our duty in the present case, is *The Queen v. Davey* (1). There an order had been made, and, in the opinion of the Court, validly made, for the removal to hospital of a person suffering from a dangerous infectious disorder. The defendant (the mother of the patient) was summoned for obstructing the execution of the order. It was contended for the complainant that the justices had no power to go behind the order of the magistrates for the removal of the child, and that they had no right to inquire into the validity of the order. The justices overruled both these objections, and found as a fact that there was no suitable hospital for the reception of the child provided within the district, and that the defendant had herself provided proper accommodation for her child; they accordingly dismissed the summons, and refused to state a case. The Court, although they held that the magistrates were wrong in point of law in allowing the validity of the magistrate's order for the removal of the child to be questioned, yet, in the exercise of their discretion, refused to make an order in the nature of a mandamus directing the justices to state a case. Channell, J., says, at p. 307 :—"It seems to me that where the person accused has been acquitted, but ought to have been convicted in a nominal penalty, it is not worth while to insist on a case being stated. If the party has been convicted by the justices on a wrong view of the law, the case is of course different, for there is no other way than the stating of a case by which the conviction can be got rid of without great difficulty."

For all these reasons I am of opinion that we ought to exercise our discretion in the present case by refusing to make absolute the conditional order, and that the motion should be refused with costs.

KENNY, J. :—

I concur, on the ground that under the Case Stated Act it is in the discretion of this Court to make the order compelling justices to state a case, and that in this case we ought not to make

the order, having regard to the circumstances disclosed in the affidavits. I am satisfied such an order would be ineffective, inasmuch as the facts as found would justify the magistrates in acquitting the accused.

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Dodd, J., concurred.

Solicitor for the prosecutor: *M. Healy.*

Solicitor for the Lord Mayor: *J. J. Horgan.*

Solicitor for the justices: *B. C. Galvin.*

C. L.

JOHN DONAGHY, APPELLANT; MICHAEL WALSH, RESPONDENT (1).

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Oct. 30.
Nov. 1.
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Jan. 19.

Justices—Unlawful gaming—Automatic machine—Game of chance—Chances not equal alike to all players—Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 2—Gaming Houses Act, 1854 (17 & 18 Vict. c. 38), s. 4.

The appellant was convicted of using his premises for the purpose of "unlawful gaming" being carried on thereon. Proof was given of the user on the appellant's premises of an automatic machine. On the insertion of a halfpenny in the machine, a marble was released, which by the operation of a trigger manipulated by the player was shot up to the top of the machine, whence it descended through a series of pins which deflected its course. The player, while the marble was falling, tried to bring beneath it a cup in the machine. The cup was fixed to a movable lever which could be moved laterally right or left at the option of the player. The object of the player was to catch the marble in the cup. If he succeeded, by an automatic action, a disc was released which entitled him to a pennyworth of the appellant's goods; if he failed, the halfpenny inserted became the property of the appellant without any return to the player. Proof was given of the user of the machine on the appellant's premises, and he was convicted under 17 & 18 Vict. c. 38, s. 4. The justices found that the game played with the machine was predominantly one of chance; that skill did not enter substantially into the game; that, having regard to the players contemplated by the appellant as using the machine, the chances were not alike equal to all the players, including the appellant; that the chances were in the appellant's favour; and that the game could not be converted from one of chance to one of skill. Upon a case stated by the justices,

(1) Before PAILLES, C.B., and GIBSON and BORD, JJ.

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Held, that the findings of the justices as to the character of the game played with the machine were questions of fact, and consequently not reviewable by the Court, and that the finding by the justices that the game was one of chance, and one in which the chances were not equal alike to all the players, including the appellant, brought the game within the provisions of 8 & 9 Vict. c. 109, s. 2, and consequently, that the game played with the machine was unlawful gaming within the provisions of 17 & 18 Vict. c. 38, s. 4, and the appellant was rightly convicted.

Fielding v. Turner ([1903] 1 K.B. 867) applied and followed.

CASE STATED under 20 & 21 Vict. c. 43, at the instance of the appellant, by the justices of the peace for the county and city of Belfast, sitting at petty sessions on the 20th January, 1913, for the district of Belfast.

At the petty sessions held for the district of Belfast, on the 29th January, 1913, the appellant was charged by the respondent, an Acting-Sergeant of the Royal Irish Constabulary, in a summons that "he, on the 9th day of January, 1913, being the occupier of the house No. 9 Ashmore Street, in the city of Belfast, did use the same for the purpose of unlawful gaming being carried on therein contrary to the statute 17 & 18 Vict. c. 38, sect. 4."

The gaming charged as unlawful consisted in the user of a machine in the appellant's shop. The machine, known as an "automatic ball machine," enabled a game to be played with marbles upon semi-automatic principles, worked upon the familiar "penny-in-the-slot" system. The machine was an upright pedestal, with a glass front, behind which the board upon which the game was played was visible. The object of the player was to catch in a cup in the machine a marble falling downwards through a series of pins. By inserting a coin, in the case in question a halfpenny, the player released a marble inside the machine. The marble ran down to a position at the bottom of the board, from which it could be shot upwards by means of a spring operated by the player by means of a trigger projecting from the right-hand side of the pedestal. On being projected by this spring the marble shot upwards between two cushions to the upper part of the board, whence it fell down through an opening in the inner cushion on to a series of pins projecting at right angles to the surface of the

board. Engagement with the pins resulted in the deflection of the downward course of the marble. The upward and downward course of the marble were visible to the player. A little distance below the pins, and in the centre of the board, there was a cup which was fixed to a horizontal lever, running transversely to the pedestal, and projecting at either side of the pedestal. This lever could be moved right or left at will by the player by means of the projecting handles at the right and left sides of the pedestal, and the movement brought the cup fixed on the lever to the right or left side of the board. The movement of the cup by the lever was limited by two bars or checks, one on each side of the board. Having shot the marble up to the top of the board, the player caught the handle of the lever, and, watching the irregular descent of the marble through the pins, endeavoured by pulling and pushing the lever to bring the cup beneath the marble as it fell free from the pins. If successful in this, the marble was caught in the cup, and by an automatic action when so caught released at the left side of the pedestal a disc which entitled the player to a prize. In the present case this disc entitled the player to a pennyworth of the appellant's goods. If the player missed the ball with the cup, the marble rolled down into position to be again released by the insertion of a fresh coin, and the player lost the halfpenny he had inserted. The game thus consisted in the endeavour by the player to obtain for one halfpenny a pennyworth of goods, or, in other words, amounted to the player backing himself to succeed in catching the ball against the machine and its proprietor at the odds of 2 to 1 against the owner or holder of the machine.

It will be seen that the purely automatic principle was only used for two purposes: (a) the initial release of the marble for play; and (b) the release of the prize disc when the marble was caught in the cup. The movement of the shooting-trigger and of the cup-lever were in the control of the player, subject, as to the former, to the strength of the spring by which it was operated; and, as to the latter, to the checks limiting the lateral movement of the cup. The course of the falling marble, except in so far as it was affected in pace by the initial velocity given by the trigger, was entirely controlled by the deflection and arrest caused by engagement with the pins, and was naturally irregular and uncertain.

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K. B. Div. So far as the initial velocity imparted to the marble was concerned, 1913. as pointed out above the player was also subject to the mechanical limitation of the spring by which the trigger acted. The player **DONAGHY** thus had in his favour (a) the initial velocity, so far as he controlled it by his manipulation of the trigger; and (b) the adjustment of the cup at will within the mechanical limits allowed. He had, as elements against him—(a) the strength of the spring which operated the trigger, (b) the deflection and irregularity of the downward course of the marble owing to the action of the pins, and (c) the mechanical limitations to the lateral movement of the cup as well as the absolute impossibility of any upward or downward movement of that object.

The appellant carried on business as a seller of confectionery on the premises at Ashmore Street, and the prize disc obtained from the machine entitled its winner to one pennyworth of sweets from the appellant's stock. On the date mentioned in the summons the respondent, when passing the appellant's shop, saw a boy operating the machine. The respondent entered the shop and spoke to the appellant's wife, asking her why she allowed the boy to use the machine, as he, the respondent, had warned her against allowing its use on the 29th December, 1913. The appellant's wife replied that notice to remove the machine had been given to the person from whom the machine had been hired: Proof was given before the justices that similar machines in other shops were very largely used by boys between twelve and fourteen years of age, who became very adept in their use; but it was admitted that persons might have a try at the game without success.

The appellant was represented at the hearing by Messrs. John Graham and Joseph Donnelly, solicitors, who contended that success in catching the marble in the cup was a matter of skill, and that the skill necessary to that success depended upon the amount of practice the player had, and that the game played with the machine was not a game of chance.

The justices who stated the case, Messrs. Brady, R.M., Gilfedder, Gibson, Rodgers, Mercier, and Doherty, convicted the appellant of the offence charged, and fined him 5s. with 1s. 6d. costs, with the alternative of seven days' imprisonment without

hard labour, holding upon the authority of *Fielding v. Turner* (1), *Thompson v. Mason* (2), and *Roberts v. Harris* (3), that the game played was unlawful gaming, the chances not being equal for all the players, including the owner of the machine, and that the game was within the mischief of the statute, and encouraged the spirit of gambling. The case was stated on the 29th April, 1913, for the opinion of the Court, as to whether the justices were right in point of law in their determination. On the case coming before the Court, the Court considered that the fact whether the game was one of chance or skill was material, and being a question of fact should be determined by the justices; and, accordingly, by an order dated the 15th May, 1913, the case was sent back to the justices with six specific questions of fact to be answered, but without prejudice to the raising of any question in argument before the Court. The questions sent to the justices and their answers thereto were as follows:—

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1. Was the game in its predominant character (a) one of chance; or (b) one of skill? (a) Yes. (b) No.

2. If the game was not predominantly one of skill, did skill enter into it to a substantial extent? No.

3. Having regard to the persons contemplated by the defendant as players, were the chances unequal, and in defendant's favour? Yes.

4. Supposing persons of average skill played, would the chances still have remained unequal, and in defendant's favour? Yes. In our opinion no amount of skill would overcome the element of chance. It must be borne in mind that the machine was used by the public generally, that is, that the majority of the users would be entirely without skill from practice, and the chances would therefore be unequal and in defendant's favour.

5. Was it necessary in order to convert the game from one of chance to one of skill that the player should have practice at it? In our opinion the game was not capable of being converted from one of chance to one of skill.

6. With practice could a visitor who was a skilled player be able to turn the chances so as to be in his favour? No.

(1) [1903] 1 K. & B. 867.

(3) 25 T. L. R. 700.

(2) 20 T. L. R. 298.

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T. W. Brown (with him *Gordon, K.C.*), for the appellant:—

As pointed out by *Hawkins, J.*, in *Jenks v. Turner* (1), unlawful gaming may arise either by reason of the place in which the gaming is carried on being an unlawful place, or by reason of the game played being itself unlawful. As *Hawkins, J.*, points out, the playing of games, except where it was done in a common gaming house, was not in any case an offence at common law, although certain games from time to time were made unlawful games by statute. He concludes his review of the statutes with reference to unlawful games by summing up the result of the statutory provisions as follows (p. 524):—"The *unlawful* games, then, now are—ace of hearts, pharoah, basset, hazard, passage, roulette, every game of dice except backgammon, and every game of cards which is not a game of *mere* skill; and I incline to add, any other game of chance." The latter portion of this passage is a mere *dictum*; it cannot be applied as an authoritative decision that every game of chance is an unlawful game; for, in fact, the learned judge did not so decide. There is no question here that the appellant's house *per se* was a common gaming-house; the conviction if it is good can only be good because the game complained of was an unlawful game. To be such a game it must come within the provisions of 8 & 9 Vict. c. 109, and although the game played with an automatic machine was held, in *Fielding v. Turner* (2), to be within those statutory provisions, because it was a game in which the chances were not alike equal to all the players, including the owner of the machine, yet the present machine was in question in a later case. That was a case in which the plaintiff sued for hire of an automatic machine identical with this machine, and the defence was that the machine constituted an unlawful game. *Scrutton, J.*, who tried the case, held that the game played with the machine was not a game of chance, that skill entered into it, and his decision was affirmed on appeal: *Pessers, Limited v. Catt* (3). In the machine in question in *Fielding v. Turner* (2), the prize was only obtained if the coin inserted by the player happened to fall into one of three compartments; the player had no control over the coin, except in the

(1) 13 Q. B. D. at p. 513.

(3) 29 T. L. R. 381.

(2) [1903] 1 K. B. 867.

initial act of projecting it into the field of play, although it appears that the destination of the coin could be, and was, affected by the strength with which the coin was started. That is a very different case from this, where the player can control not only the starting mechanism but also the movements of the cup in which it is his object to catch the marble. *Fielding v. Turner* (1) was cited to Scrutton, J., in *Pessers, Limited v. Catt* (2), and, consequently, the decision of the learned judge in the latter case amounts to a distinction of the case of this machine from the case of the machine before the Court in the former case. The machine in this case is also clearly distinguishable from the machines in *Roberts v. Harris* (3) and *Thompson v. Mason* (4). The provisions in 8 & 9 Vict. c. 109, as to games in which the chances are not alike favourable to all the players, must be read in the context in which they occur as qualifying or enlarging the "unlawful games" mentioned in that statute, and not as a new definition of "unlawful games."

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The Solicitor-General (Jonathan Pim, K.C.), and James Rearden,
for the respondent:—

The only question before the Court is whether the appellant was guilty of the offence of which he was convicted, *i.e.* unlawful gaming. That question can only be decided by this Court on the point whether in law what was proved was proof of unlawful gaming. It amounts to this question, Was the game played with this machine an unlawful game? That is a question of mixed law and fact, and the answers of the justices are findings of fact upon the evidence which cannot be questioned by this Court, unless it be shown that there was no proof to sustain the findings. That has not been done, and the Court has to consider whether a game found, as here, to be a game of chance in which the chances are not favourable alike to all the players, including the owner of the machine, is, or is not, one of the class of unlawful games dealt with by 8 & 9 Vict. c. 109. On that point the decision in *Fielding v. Turner* (1) is a direct authority, and, as an authority

(1) [1903] 1 K. B. 867.

(2) 29 T. L. R. 381.

(3) 25 T. L. R. 700.

(4) 20 T. L. R. 298.

K. B. Div. upon a statute common to Ireland and England, is one which this
 1913. Court will follow. The character of the game is conclusively
DONAGHY determined, so far as this Court is concerned, by the findings;
v. the law applicable to that character is authoritatively declared by
WALSH. the King's Bench Division in England.

T. W. Brown, in reply :—

Whether the game was an unlawful game or not depends upon the construction of the statute, 8 & 9 Vict. c. 109. That is a question of law, and is open to this Court. But the findings of the justices amount to finding that the game is an unlawful game, and so far as the findings relate to the statute they can be here questioned. *Fielding v. Turner* (1) must be read with reference to the character of the machine before the Court in that case, and must be read with the conflicting decision in *Pessers, Limited v. Catt* (2), decided with full knowledge of the decision on law given in the former case.

Cur. adv. vult.

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PALLES, C.B. :—

Jan. 19.

The case was stated upon the hearing of a complaint against the defendant, that "he being the occupier of the house, No. 9 Ashmore Street, did use the same for the purpose of 'unlawful gaming' being carried on therein, contrary to the Act, 17 & 18 Vict., c. 38, s. 4."

The case stated that the defendant kept in his shop an automatic machine, which is therein particularly described. A halfpenny, which is put into it through a slot, releases three marbles. A trigger, when drawn, thereupon shoots up, with great rapidity, one of the marbles to the top of the machine, from which it falls down through a number of pins. The operator, whilst it is falling down, tries, by moving a lever, to catch the marble in a cup which is inside the machine. If the marble is so caught in the cup, the operator is entitled to goods value one penny; if it is not so caught in the cup, the halfpenny becomes the property of the owner or hirer of the machine. It was proved that this machine was being used in the shop.

[1903] 1 K. B. 867.

(2) 29 T. L. R. 381.

It seems quite clear that, although only one person was operating the machine, a game within the meaning of 8 & 9 Vict. c. 109, s. 2, was being played between that one person and the owner or holder of the machine. To use the words of Lord Alverstone, in *Fielding v. Turner* (1), in reference to a machine similar in principle to that here: "The owner of the machine may be said to back his chance of the money falling into one of the four compartments, in which case it will be retained without return, as against the centre compartment, out of which alone a prize can be drawn. The keeper or owner of any such machine backs his chance against the person who uses it." So here the owner of the machine backs the event of the marble not being caught in the cup, in which case the halfpenny is retained by him, against the person who uses the machine, and backs the event of the marble being caught in the cup.

There was, therefore, evidence that the defendant used the shop for the purpose of carrying on "gaming" therein, and thus the question arises, which has been so ably argued by Mr. Brown, was such "gaming" "unlawful gaming" within the meaning of 17 & 18 Vict. c. 38, s. 4?

This is the second occasion on which this case has been before the Court. On the first, on which the Court was constituted differently from the mode in which it is at present, the Court was of opinion that whether the game was one of chance or of skill, and, if the former, whether the chances were alike favourable between the appellant and the other players, were questions of fact, and, accordingly, made an order whereby, without prejudice to any question, the case was sent back to the justices to answer certain questions.

The questions, and the justices' answers thereto, were as follows:—

(1) "Was the game in its predominant character (a) one of chance, or (b) one of skill?" (a) "Yes." (b) "No."

(2) "If the game was not predominantly one of skill, did skill enter into it to a substantial extent?" "No."

(1) [1903] 1 K. B. 867.

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K. B. Div. (3) "Having regard to the persons contemplated by the
 1914. defendant as players, were the chances unequal and in defendant's
 DONAGHY favour?" "Yes."

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 WALSH. (4) "Supposing persons of average skill played, would the
 Palles, C.B. chances still have remained unequal and in the defendant's
 favour?" "Yes. In our opinion no amount of skill would
 overcome the element of chance. It must be borne in mind that
 the majority of the users would be entirely without skill from
 practice, and the chances would therefore be unequal and in
 defendant's favour."

(5) "Was it necessary, in order to convert the game from one
 of chance to one of skill, that the player should have practice at
 it?" "In our opinion the game was not capable of being
 converted from one of chance to one of skill."

(6) "With practice, could a visitor who was a skilled player
 be able to turn the chances so as to be in his favour?" "No."

At the close, indeed after the close, of the arguments, it was
 suggested by Mr. Brown that this order was wrong, and that these
 questions involved merely matter of law, and ought to have been
 decided by the Court itself, and that the decision of the justices on
 these questions was reviewable by this Court. I am of opinion
 that the order was right; that the questions sent to the justices
 involved matter of fact, and that their decision upon them conclu-
 sively binds us. It is true that, in many cases, the question
 whether a game is one of chance or of skill becomes, when the
 nature of the game is proved, a matter of law; but in the present
 case the probability of the player winning depends in fact upon the
 velocity with which the marble is moving when the attempt is made
 to catch it. We have had the machine here, and I have seen it
 played, and I agree in the answers of the justices.

We have been referred to *Pessers, Limited v. Catt* (1), in which
 Scrutton, J., when trying an action without a jury, held that
 a game, played with a machine similar to that here, was a game
 of skill and not of chance, and that decision was affirmed in the
 Court of Appeal; but we know nothing of the strength of
 the spring in that case or the consequent velocity of the ball.

Further, the Court there, as the trial was one without a jury, had jurisdiction to decide questions of fact—a power which is denied us when hearing a case stated by justices; and further, both Scrutton, J., and the Lords Justices appear to have treated the question as one of fact.

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The question, then, is whether the two circumstances found by the justices, viz. that the game was one of chance, and that the chances of all the players were not alike equal, render the game “unlawful gaming” within the meaning of section 4 of the Act of 1854 (17 & 18 Vict. c. 38).

That Act does not contain any definition of “unlawful gaming”; but by the first, second, third, and fifth sections, it refers to 8 & 9 Vict. c. 109; and it was held in *Fielding v. Turner* (2) that that Act enables the Court to ascertain what was the class of game or transaction which was considered to be unlawful within the meaning of the Act of 1854. I, therefore, as did the Judges in *Fielding v. Turner* (2), turn to 8 & 9 Vict. c. 109, sect. 2, to ascertain from it whether this game was unlawful gaming.

The preamble of the section states its object. It recites that “doubts have arisen whether certain houses alleged or reputed to be opened for the use of subscribers only, or not open to all persons desirous of using the same, are to be deemed common gaming-houses”; and it then proceeds to declare that, in default of other evidence, it shall be sufficient, to prove that any house or place is a common gaming-house, to prove that it is kept or used for the playing therein of certain games. The games which are to have this effect are of two classes. First, “unlawful games,” “and that a bank is kept there by one or more of the players exclusively of the others”; secondly, “any game”—an expression in which the adjective “unlawful” is not contained—in which the chances “are not alike favourable to all the players, including among the players the banker or other person by whom the game is managed or against whom the other players stake, play, or bet.”

Every such house or place is to be deemed a common gaming

(1) [1903] 1 K. B. 867.

K. B. Div. house, such as is contrary to law and forbidden to be kept by
 1914. the Act therein recited of 33 Henry 8, c. 9, and by all other
DONAGHY Acts containing any provisions against unlawful games or gaming
v. houses.
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Palles, C.B. That is, a house or place, by reason of its user by playing certain games not specifically described as unlawful, is declared to be a common gaming house and unlawful, and to be within the provisions of former Acts against *unlawful* games.

Surely the game of which the playing is to have this effect is, in this declaratory provision, assumed to be an unlawful game, and, if not so assumed, is enacted to be unlawful.

This was the view taken of the section in *Fielding v. Turner* (1). "This section," says Lord Alverstone, "is somewhat difficult to construe, but in our opinion"—and with this opinion I thoroughly agree—"it does indicate that a game in which the chances are not favourable alike to all the players, including among the players the persons by whom the games are managed, or against whom the players stake, is an unlawful game."

I entertain a strong opinion that this is the true construction of the section. It is the only one which accounts for the omission of the word "unlawful" in the expression "any game," and also the only one which gives any effect to the provision as to games in which the chances are not "alike favourable to all the players." Were the word "unlawful" interpolated by construction in this expression, every game in the alternative class would have been contained in the original class, and, therefore, there would not have been any necessity for the alternative.

In my opinion the conviction should be confirmed.

GIBSON, J. :—

In the original case stated, dated 29th April, 1913, the decision of the magistrates was apparently based on the earlier cases in the King's Bench Division in England; when the argument was opened it appeared desirable to the Court, in view of the subsequent decision in *Pessers, Limited v. Catt* (2), which had not

(1) [1903] 1 K. B. 867.

(2) 29 T. L. R. 381.

been before the justices, to refer the case back for specific findings to enable the several questions argued to be decided on facts properly ascertained; and by order dated the 15th May, 1913, the case was so referred with the questions of fact required to be answered, as to the effect of the answers to which questions the Court then expressed no opinion. The amended findings of fact, dated the 3rd July, 1913, are now before us; they are opposed, not only to the view of fact taken by Scrutton, J., and Kennedy, L.J., in *Pessers, Limited v. Catt* (1), but also, we were informed, to the conclusion of the Scotch judges; but no report of this last case has been brought before us. It is no doubt inconvenient that the tribunal of fact in Ireland should have come to a decision in conflict with that of the English and Scotch Courts. In the dishorning case, however, our King's Bench, on facts set forth in a case stated, held the operation of dishorning was not cruelty within the statute: *R. v. M'Donagh* (2), though in *Ford v. Wiley* (3) dishorning had been held to be cruelty. On a case stated, jurisdiction is confined to questions of law, and findings of fact are conclusive, unless it appears that there was no evidence to support them. In some cases, whether a game is one of chance or skill is settled by the description given in the case. The operation, however, of the machine produced before us in Court is such that it would be impossible for us to lay down that the conclusion of the justices was impossible. Considering the factors in the case, the infinitesimal time allowed for the possibility of catching the ball, the difficulty of accommodating the hand-movement to the varying velocity and direction of the falling ball, and the uncertain force of the spring projecting the ball and governing its speed, the Court cannot decide that the justices' view as to the character of the game was irrational or unsupported by evidence. The Belfast justices must rely on their own faculties and senses, and cannot be asked to substitute for their own opinion conclusions of fact arrived at elsewhere. In *Pessers, Limited v. Catt* (1), the case was tried and decided on the view that the character of the game, as one of chance or skill, was a question of fact.

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Gibson, J.

(1) 29 T. L. R. 381.

(3) 23 Q. B. D. 103.

(2) 28 L. R. Ir. 204.

K. B. Div. Whether the energy of the spring in all machines is identical may
1914. be uncertain.

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The facts found are as follows:—The machine is largely played at by young boys; it tends to encourage the spirit of gambling; the game is predominantly one of chance; skill does not enter into it to a substantial extent; having regard to the persons contemplated as playing, the chances were unequal and in the defendant's favour; and the game was not capable of being converted from one of chance to one of skill.

That a game of chance may be unlawful is suggested by Hawkins, J., in *Jenks v. Turpin* (1). In *Pessers, Limited v. Catt* (2) and in *Morris v. Godfrey* (3), the only point argued was, whether the game was one of chance or skill. In the former case—an action—the verdict of Scrutton, J., was that the game was one of skill, so that the point as to the inequality of chances did not arise. In the latter case the chances were equal, and the decision involves that a game of chance is unlawful—where, at least, the owner, as in that case, has a pecuniary profit in getting persons to play. Where young persons are invited to take part in a game of chance, to whom a trifling stake may represent a considerable sum, and benefit to the owner is contemplated by him, such game may well be deemed unlawful.

On the facts ascertained by the justices, *Fielding v. Turner* (4), and decisions following that case, are direct authorities supporting the present conviction. They were influenced by the Gaming House Act, 8 & 9 Vict. c. 109, sect. 1 of which makes a game of skill in a gaming-house unlawful gaming, and sect. 2 introduces the element of inequality of chances in favour of the owner. The section is awkwardly expressed, but we must follow the view of law taken in the series of English cases as to statutes common to both countries. The two elements required by *Fielding v. Turner* (4) are here found to exist.

Use on only one occasion was proved. In *Jayes v. Harris* (5) the Court held that habitual user or plurality of acts was essential

(1) 3 Q. B. D. 505.

(2) 29 T. L. R. 381.

(3) 23 Cox, 40.

(4) [1903] 1 K. B. 867.

(5) 21 Cox, 639.

to warrant a conviction. This is opposed to the language of *K. B. Div.* Lord Halsbury in the *Kempton Park Case* (1), and to the opinion I expressed in *M'Connell v. Brennan* (2). The nature of the machine, and the circumstances, point to deliberate user in connection with business, and the facts are quite different from those in *R. v. Davies* (3), where there was only an isolated casual act. Where an apparatus for the purpose of unlawful gaming is installed and put in use, the penalty attaches, and the owner cannot claim immunity for the day of starting any more than for the subsequent days. The words are "open, keep or use." The word "open" clearly applies to the first day of opening; and, as to "use," continuance of user only facilitates proof, but is not indispensable for conviction.

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Solicitor for appellant: *John Graham.*

Solicitor for respondent: *Sir Malachy Kelly, Chief Crown Solicitor.*

C. N. K.

(1) [1899] A. C., at p. 164.

(3) [1897] 2 Q. B. 199.

(2) [1906] 2 I. R. 411, at p. 421.

BARNES v. FOX (1).

Appeal.
1913.

Nov. 4, 5. *Seduction—Master and servant—Loss of service—Service at time of seduction—Service at time of confinement.*

In an action by a father to recover damages for the seduction of his daughter, it appeared that the daughter had been engaged by the defendant's wife as a domestic servant, one of the terms of the employment being that during any absence from home of the defendant's wife the girl was to return to her father's house, and remain there unless called on to perform household duties in the defendant's house. During one of these periods of absence she was called to the house by the defendant, and there seduced by him. She was subsequently, while in the service of the defendant's wife, confined of a child, the confinement taking place in the defendant's house.

Held, that a verdict directed for the defendant was sustainable,

Per O'Brien, L.C., on the ground that the girl was not in the service of the plaintiff at the time when the confinement took place;

Per Cherry, L.J., on the ground, that she was not in the plaintiff's service at the time of the seduction;

Per Holmes, L.J., on either of these grounds.

APPEAL from an order of the King's Bench Division refusing the plaintiff's motion for a new trial.

The plaintiff in the action was John Barnes, the father of Charlotte Bridget Barnes, and he claimed damages for the seduction of his daughter by the defendant, James Fox. The action was tried before Mr. Justice Wright and a special jury of the city of Dublin, when the jury by direction of the judge found a verdict for the defendant. The girl, Charlotte Bridget Barnes, had been employed by the defendant to work in his fields, and in April, 1911, she was employed by the defendant's wife to work in the house, returning to her father's house every night, and sleeping there. In October or November, 1911, however, a new arrangement was come to by which the girl slept in the defendant's house, it being part of such arrangement that during any period in which Mrs. Fox should be absent from her home, the girl should return to her father's house, and remain there both

(1) Before O'BRIEN, L.C., and HOLMES and CHERRY, L.JJ.

day and night, unless when called upon occasionally during any such period to attend in the daytime at the defendant's house to perform such casual domestic duties as might be necessary. Mrs. Fox was absent from home on several occasions, and during such occasions the girl, in accordance with the arrangement mentioned, went to and remained at her father's house. During one such period of absence, in May, 1912, the girl, being in her father's house, received a message from the defendant asking her to attend at his house on the following morning to perform some domestic duties. In consequence of such message she attended, and cleaned and scrubbed the house. On this occasion, while in the house, she was seduced by the defendant. About a month afterwards while in the defendant's house under similar circumstances during Mrs. Fox's absence the defendant again had connection with her; she continued in Mrs. Fox's service during pregnancy, and on January 20th, 1913, while in Mrs. Fox's service, and residing in defendant's house, she gave birth to a child. In her evidence the girl stated that she was paid by the month, but received no wages for the occasions she stayed at her father's house during the periods in which Mrs. Fox was absent. She admitted, however, on cross-examination that she had been paid on two such occasions (on the 1st May, 1912, and on the 1st June, 1912) the usual monthly wages, 10s., but explained on re-examination that these were payments made on a wrong date, and did not cover the periods during which she had returned to and remained in her father's house. She further admitted on cross-examination that while so absent in her father's house, during any absence of Mrs. Fox, if she got a message from the defendant, she "had to come back and do the work just as if she (Mrs. Fox) was there."

At the close of the plaintiff's case, counsel for the defendant asked for a direction, on the ground that the plaintiff's daughter was not in his service—(1) at the time when the seduction took place; or (2) at the time of the birth of the child. The learned judge ruled in favour of the defendant upon the first ground, and directed the jury to find for the defendant. Plaintiff moved in the King's Bench Division for a new trial, on the ground that there was evidence in support of the plaintiff's claim proper to be left to the jury, and that the learned judge was in error in

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withdrawing the case from the jury and directing judgment for the defendant. The King's Bench Division held that the defendant should succeed on the second ground, and refused the application, but expressed no opinion on the first ground, Palles, C.B., in giving the judgment of the Court, saying that he should have been better satisfied if a question had been left to the jury as to whether the plaintiff had sustained any loss of service, although the evidence on that point was very strong in favour of the defendant. The present appeal was from this order.

Lynch, K.C., and Moonan, for the plaintiff :—

The girl, upon the evidence, was in the service of her father, the plaintiff, at the time of the seduction, and it is immaterial where the confinement takes place: *Long v. Keightley* (1). Very slight evidence of service is sufficient. The girl was not in the continuous employment of Mrs. Fox, because the father had to support his daughter during the periods she was at home, and she assisted in the ordinary business of the house. *Hedges v. Tagg* (2) has therefore no application to this case. We submit there was strong evidence to go to the jury that the employment by Mrs. Fox was not continuous, and that there was loss of service to the plaintiff. [They referred to *Manvell v. Thompson* (3); *Rist v. Faux* (4); Roscoe's *Nisi Prius*, 18th ed., p. 911; Lord Halsbury's *Laws of England*, vol. xx, p. 273.]

Sergeant Sullivan, K.C., and Russell (for the defendant) :—

The plaintiff must prove the relation of master and servant between himself and the injured girl. Prior to *Davis v. Williams* (5) it was perhaps a doubtful point whether the plaintiff had to prove that the girl was in his service at the time of the seduction. Loss of service is essential, and it is the person who loses the service who must bring the action; the test is, Who is entitled to her service at the date of her incapacity?

(1) I. R. 11 C. L. 221.

(2) L. R. 7 Ex. 283.

(3) 2 C. & P. 303.

(4) 4 B. & S. 409.

(5) 10 Q. B. 725.

The incapacity must arise from the seduction, though not necessarily resulting from confinement: *Hamilton v. Long* (1). Contracts of service are continuous although they allow a servant to return to the parents' house. The address at which the girl is confined does not affect the rights of the parties; this is the only point decided in *Long v. Keightley* (2). Wages are not necessary elements of contracts of service: *Whitebourne v. Williams* (3); *Hedges v. Tagg* (4) is an authority on every point in this case.

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Lynch, K.C., in reply :—

We rely on *Long v. Keightley* (2); its facts are analogous to this case. [He referred to *Barbour v. Barron* (5).]

O'BRIEN, L.C. :—

It really would be sufficient if I were to say that I adopt the judgment of the Lord Chief Baron, but, as a particular meaning has been put on a passage in his judgment, I wish to add a few words. It has been said that the Lord Chief Baron was of opinion that there was a case to go to the jury. He says he would have been better satisfied if a question had been left to the jury; but I think it is clear that strictly he considered there was no question which could be left to the jury—having regard to the evidence which was given—on which a finding would have entitled the plaintiff to judgment. That is also my view. I think that the evidence of this girl, taken and read in the only way that it could be read, shows that at the time when the confinement took place she was in the service of Mrs. Fox, and there is no technical evidence from which any loss of service sufficient to sustain an action by the father could be inferred. This being so, the case of *Hedges v. Tagg* (4) is a clear and conclusive authority against the plaintiff on the second branch of the case argued before us.

I express no opinion upon the point that was raised, namely, that *Hedges v. Tagg* (4) may be open to doubt with respect to the proposition that absence of service at the time of the seduction is

(1) [1905] 2 I. R. 552.

(2) I. R. 11 C. L. 221.

(3) [1901] 2 K. B. 722.

(4) L. R. 7 Ex. 283.

(5) 28 I. L. T. R. 97.

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conclusive against the plaintiff. If there be anything in this suggestion, it can be decided in some other case. But in my opinion it is not necessary to discuss it in the present case, as my view is so clearly against the plaintiff on the ground which I have mentioned.

HOLMES, L.J.:—

Counsel, at the conclusion of the evidence for the plaintiff, applied to the judge to give judgment for the defendant on two grounds—(1) because the plaintiff's daughter was not in his service, but in the service of Mrs. Fox, at the time of the seduction; and (2), because even if this were not so, she was in the service of Mrs. Fox when the child was born.

Mr. Justice Wright yielded to this application on the first ground; and the Divisional Court, without dissenting from this view, held that the defendant was entitled to succeed on the second ground.

I am of opinion that the judgment can be sustained on either ground. A father cannot succeed in an action for the seduction of his daughter if she is in the service of another person at the time of the wrongful act. This proposition has been long accepted as settled law; and the evidence of both mother and daughter in this case establishes, in my opinion, that from a date before the seduction until after the birth of the child the daughter was continuously in the service of Mrs. Fox. It is said that it was a term of the contract of service that when Mrs. Fox was absent from her home the girl was to stay at her father's, subject to a condition that she was to go to Fox's house to do the work of a servant therein any time when required. It is admitted that on the two occasions when the defendant had sexual connection with her she was working in Fox's house pursuant to this condition. It is said that it was also a term of the contract that she was to be paid no wages while thus in her father's house. The evidence on this point is unsatisfactory; but I think it immaterial whether she was paid wages or not, provided she was bound to act as Mrs. Fox's servant when required, and that at the time she was so acting she was seduced. In considering the second requisition, I

assume that the girl was in the service of the plaintiff at the time of the seduction; but the cause of action does not arise from the mere sexual intercourse. If pregnancy does not follow, no action lies. The wrong is the diminished capacity to serve arising from the pregnancy. In most instances of seduction the girl continues after the seduction to live with the plaintiff, and to be in theory his servant just as she had been before; and it is assumed that he loses her services during her confinement. But such an assumption cannot arise in the present case. Even if she was not Mrs. Fox's servant in the month of May, she certainly was so in June, and, as I read the evidence, continued to be so until after the child was born. Any loss arising from the pregnancy and confinement was sustained by Mrs. Fox, who supplied the doctor and nurse and took care of her until she was able to go to her father's house. This is, I think, the view taken by three of the judges in *Hedges v. Tagg* (1). If their decision goes beyond this, I would hesitate to follow it. If, for example, the girl lived with her father and was, in theory, his servant for some months after the seduction, and there was evidence that during that period her health was seriously affected by her pregnancy, I think the action would lie, even although before her confinement she had been able to enter Mrs. Fox's service, and was confined in her house. But that would be wholly different from the present case. I think it unfortunate that the action of seduction rests upon what, in most cases, is a pure fiction. A girl living with her father and mother is rarely their servant in any true sense of the word. It is, however, too late to attack this fiction; but I shall not extend it; and I am not prepared to act on it in a case in which during her pregnancy and confinement she is the servant of another master or mistress.

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Holmes, L.J.

CHERRY, L.J.:—

I concur; and I desire to base my judgment on the same grounds as Mr. Justice Wright has done. I am of opinion that, on the evidence, there were clear grounds for the direction in favour of the defendant which he gave. As regards the existence

(1) L. R. 7 Ex. 283.

Appeal. of a contract of service with the defendant at the date of the
 1913. seduction, the clear and express language of the young woman
 BARNES herself shows that her employment was continuous, during the
 v. month of May at all events. This view is strongly corroborated
 FOX. by the fact that she was paid her wages of 10s. per month on the
 Cherry, L.J. 1st of May, and also on the 1st of June, showing that she was
 certainly paid by Fox for the whole month of May. That, to my
 mind, ends the case, for the plaintiff was clearly not in any way
 entitled to her services at the date of the seduction, and cannot,
 therefore, maintain this action. It is not necessary for me to say
 anything as to the other point.

Appeal dismissed with costs.

Solicitors for the appellant: *Keating & Keating.*
 Solicitor for the respondent: *W. J. Shannon.*

J. M.

THE KING *v.* PATRICK RYAN AND ANOTHER (1). *K. B. Div.*
1914.

Practice—Criminal law—Jurors book—Inherent jurisdiction of Court— June 5.
Application to quash the panel.

Where the record of a criminal trial has been moved into the King's Bench, the Divisional Court will not entertain an application made to its inherent jurisdiction to quash the panel on the ground that the jurors book is irregular.

The Court declined to order an inspection of the jurors book.

APPLICATION on behalf of the prisoners to the King's Bench Division, to exercise its inherent jurisdiction by quashing the panel in the case of a criminal trial the record of which had been moved into the King's Bench. The jurors book was alleged to be irregular because the column stating what jurors had served before was blank. There was no substantive evidence that any of the jurors had in fact served. It was stated on behalf of the Crown in the course of the proceedings that none of the jurors had served before.

Lynch, K.C. (with him *M. Kenny*), for the prisoners :—

The panel is not in accordance with sect. 18 of 34 & 35 Vict. c. 65, Juries Act (Ireland), 1871. It is not a panel at all. The column for persons who have served before is blank. That state of facts must be got over. The under-sheriff who has the books could state the facts. The Court has control over its own records. A similar application was made in *O'Connell's Case* (2). In that case the Court held that it was a matter of revision, and that the Recorder's signature was final. I admit there is no case of such an application in England.

[The Attorney-General :—None of these jurors have served in preceding years.]

The onus is not on me to show the irregularity, as I have no

(1) Before *PALLES, C.B.*, and *GIBSON, J.*

(2) Report by *Armstrong and Trevor*, p. 115*.

K. B. Div. access to the sheriff's books. There is no affidavit by the sheriff.
 1914. In *Lord G. Gordon's Case* (1) there was an application to the
REX King's Bench that the sheriff should give a list of jurors to
v. prisoner.
RYAN.

[Palles, C.B. :—That was a case of treason. The prisoner had a statutory right.]

The Attorney-General (Moriarty, K.C.) (with him *R. M. Hennessy, K.C.*, and *James Rearden*) for the Crown :—

We object to allow the applicant inspection of the books.

[Gibson, J. :—At some period of a challenge to the array the prisoner is entitled to see the books.]

[Palles, C.B.—I would, if there were a challenge to the poll, call the sheriff and direct him to show his books.]

This application is unprecedented ; the prisoner applies to see the sheriff's books for three years. [Palles, C.B. :—He can only inspect the current book.]

PALLES, C.B. :—

This is a matter that can be only inquired into at the trial. Mr. Lynch can take such proceedings as he thinks fit at the trial, and, if anything is wrong, it can come up on error.

GIBSON, J., concurred.

Solicitor for the Crown : *F. F. Cullinan.*

Solicitor for the prisoners : *John B. Lynch.*

A. E. C.

LONG v. LARKIN AND OTHERS (1).

K. B. Div.

1913.

Conspiracy—Procuring breach of contract of employment—Dispute between employer and other employers—Trade Disputes Act, 1906 (6 Edw. 7, c. 47), s. 3; s. 5, sub-s. 3.

April 21, 22,

23, 24, 25.

June 7.

Appeal.

Nov. 18, 19.

20, 21, 24.

Dec. 19.

The plaintiff was a stevedore who, in order to carry out his contracts for the discharge of cargoes, hired dock labourers, many of whom were members of a trade union known as the Irish Transport Union. The other stevedores of the port had formed a Stevedores' Association for the purpose of compelling ship-owners to pay higher rates, which association the plaintiff had refused to join. The defendants, some of whom were officials of the Irish Transport Union, and the others of whom were stevedores who had joined the Stevedores' Association, entered into an agreement to force the plaintiff to join the Stevedores' Association; and in pursuance of this agreement the defendants procured dock labourers who had been employed by the plaintiff to break their contracts and leave his employment, causing actual money loss to the plaintiff. There was no dispute between the plaintiff and the dock labourers, the dispute being one between the plaintiff and the Stevedores' Association, into which the stevedores brought the defendants the officials of the Transport Union.

Held, by the Court of Appeal, affirming the decision of the King's Bench Division, that the acts of the defendants were not done in contemplation or furtherance of a "trade dispute" within the meaning of the Trade Disputes Act, 1906, and were actionable.

MOTION on behalf of the defendants, James Larkin, William Hopkins, Laurence Redmond, William Newman, William Long, and Joseph Donohoe, for an order that the judgment entered for the plaintiff in the action, dated the 6th December, 1912, be set aside and reversed, and in lieu thereof judgment with costs of the action might be entered for defendants, or, in the alternative, that a new trial of the action be ordered.

This action was tried before the Lord Chief Baron and a special jury of the county of the city of Dublin on the 2nd, 3rd, 4th, 5th, and 6th days of December, 1912.

(1) In the King's Bench Division before GIBSON and KENNY, JJ. WRIGHT, J., was also present during the argument, but died before judgment delivered. See observation of GIBSON, J., *post*, pp. 318, 319.

K. B. Div. The statement of claim, delivered on the 21st October, 1912,
1913. was as follows:—

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LARKIN. 1. The plaintiff has for many years carried on in the Port of
Dublin the business of a stevedore. The defendant James Larkin
is the organizing secretary of the Irish Transport Workers' Union,
and the defendants Hopkins and Redmond are delegates of said
union. The defendants Newman, Long, and Donohoe are members
of the Dublin Stevedores' Association, which was formed as an
association of employers about the time of the matters hereinafter
complained of.

2. In the course of the plaintiff's business he enters into contracts with shipping agents for the discharge of cargoes from vessels coming to the port, and for the purposes of executing the said contracts he employs a class of workmen known as dock labourers, and enters into the usual contracts of employment with them.

3. In or about the months of August and September, 1912, the defendants wrongfully and maliciously conspired and agreed to combine amongst themselves, and did so combine, to procure, cause, and induce the aforesaid workmen of the plaintiff to leave his employment, and abstain from continuing therein, and did further procure, cause, and induce dock labourers and others to refuse to work for the plaintiff. In furtherance and pursuance of the said conspiracy the defendants did in fact procure, cause, and induce workmen of the plaintiff to leave his employment and abstain from continuing therein, and did further in fact procure, cause, and induce such labourers and others to refuse to work for the plaintiff.

4. By reason of the said conspiracy and combination the plaintiff has suffered great loss and damage, and has been unable to carry on his business, and has been unable to obtain contracts, and has been seriously injured in his trade.

5. The defendants intend to continue the said acts complained of, and unless restrained by an order of the Court will persist therein, causing great loss and damage to the plaintiff.

6. The plaintiff claims £1000 damages, and an injunction to restrain the defendants from doing the acts complained of in paragraph 4 hereof.

The defendants Larkin, Hopkins, and Redmond delivered their defence on the 28th October, 1912, the material portion of which, apart from admissions and traverses, was as follows:—

“By way of further defence to this action the said defendants say that, at the time the matters complained of in this action were done and effected by them, there was a trade dispute in existence and then pending between the plaintiff and the dock labourers of the Port of Dublin and the Transport and General Workers' Union on their behalf, relative to the wages and the rate of remuneration to be paid by the plaintiff to such labourers for services rendered by them for the plaintiff in the discharging and unloading cargoes from vessels arriving at the Port of Dublin; and the said defendants as members of the Transport and General Workers' Union, acting on behalf of the dock labourers generally, and with their concurrence, acted as they did in withdrawing dock labourers then in the plaintiff's employment, and in refusing to allow any of such labourers to work for the plaintiff, as they lawfully might in contemplation and furtherance of such trade dispute within the meaning of sects. 3 and 4 of the Trade Disputes Act, 1906 (6 Edw. 7, c. 47), and the said defendants will submit and contend that by reason thereof this action is unsustainable in law.”

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The defendants Newman, Long, and Donohoe delivered their defence on the 6th November, 1912, in which they traversed the statements in the statement of claim.

The plaintiff joined issue with all the defendants by two replies delivered on the 8th November, 1912.

The statement of claim was amended at the trial, as appears from the extract from the judge's note hereafter. The effect of such amendment is clearly stated in that extract.

The evidence is very fully reviewed in the judgment of Gibson, J.; and the following is a short synopsis, sufficient to assist the comprehension of the arguments:—

Matthew Long, the plaintiff, deposed that he had been for years a stevedore in the Port of Dublin, and that he specialized in timber and general cargoes; that until 1912 there was no Stevedores' Association in the port, and that he never had any dispute with his men or with the Irish Transport Union, and

K. B. Div. that he had always paid the highest current rate of wages. On
1913. the 10th June, 1912, he received a circular, in consequence of
LONG which he attended a meeting at Liberty Hall, the headquarters of
v. the Irish Transport Union. Larkin was present at the meeting;
LARKIN. the defendant Long was not. A manuscript list of prices was
produced, and it was arranged that the list should be printed,
and the meeting was adjourned. On the 18th June he (the
plaintiff) was present at a meeting of stevedores at Shaw Street.
The list of prices was discussed, and he found that the list did not
affect his business, the rate of wages and terms of employment
in the list being the same as were current in his business, and
on the breaking up of the meeting he said he had no further
interest in it. He did not attend any other meeting, and did not
join the Stevedores' Association. His name was included as a
member of the association, but was withdrawn by his order. Until
the 24th July he (the plaintiff) did not know that any association
had been formed. On the 24th July the defendant William Long
came to see the plaintiff at Rush, and brought with him a manuscript
of the list of rates to be charged by the stevedores to shipowners,
and told the plaintiff that he had been sent by Newman with
the list. William Long asked the plaintiff to join the association;
the plaintiff refused, as he said he had a regular trade in steamers
and that he would not change the rates he charged. William Long
told the plaintiff that unless he joined the association, and charged
the same rates, he would get no men to work for him, as they (the
stevedores) had made an arrangement with Larkin not to allow
the men to work. The plaintiff replied that it was none of
Larkin's business; that he had no dispute with his workmen,
and he did not think Larkin should interfere. William Long
said, "That is all nonsense. What is it Larkin cannot do?"
On the 27th July, the plaintiff, being in Dublin, met the defendants
Newman, Long, and Donohoe at Butt Bridge. Newman asked the
plaintiff what he was going to do; the plaintiff replied he had
made up his mind not to join the association. Newman said the
plaintiff would not get men to work for him, as Larkin had
promised to assist the association in every way to get their prices,
and that if the plaintiff did not join, Larkin would withdraw the
men. On the same evening the defendant Hopkins told the

plaintiff that Larkin wanted to see him; the plaintiff went to Liberty Hall, but did not see Larkin.

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On the 2nd August, when the plaintiff was discharging the "Schoona," Hopkins met the plaintiff on the quay, and told him that Larkin was away in London, and that he (Hopkins) as delegate had got orders to stop the plaintiff. The plaintiff finished discharging the "Schoona" on the 7th August, and on the same evening the "Sieben Jarl" arrived at the port. That evening the defendant Redmond came to the plaintiff and said Larkin wanted to see him. The plaintiff saw Larkin, and the latter said that unless the plaintiff joined the Stevedores' Association and charged the same rates, he (Larkin) would withdraw the men. The plaintiff replied that he had always paid the highest port wages, that it was his own business what he charged the shipping agents, that the wages on Larkin's list were the same as he (the plaintiff) had paid for twenty years, and the conditions were the same; Larkin said that he had a meeting of the stevedores the day before, 6th August, and had arranged to assist them in every way, and had promised to withdraw the men from the plaintiff, unless the plaintiff charged the rates of the association. On the 8th August the plaintiff engaged thirty-three men to discharge a ship; the men commenced working at 6 a.m.; at 7.15 a.m. Redmond and Hopkins came down, and Hopkins ordered the men off, and said to plaintiff that he might make up his mind he would be further stopped until he joined the association.

On the 17th August the plaintiff met Newman at Eden Quay. Newman said, "Here Matty, what do you mean, you must be silly. Look at the money you would be making. One job would be as good as two to you." The plaintiff replied that it was his own business. Newman said that plaintiff might make up his mind that he would be further stopped.

On the 22nd August the plaintiff engaged thirty-five men to discharge the "Schoona." The men were half-way down to the ship when they were stopped by Hopkins. On the 23rd September the plaintiff tried to discharge the "Thelma." Forty men were engaged, who started work at 12 noon. Hopkins appeared, and ordered all the men off.

Daniel Lawlor, Kelly, Routh, and Preston, dock labourers

K. B. Dir. were called on behalf of the plaintiff, and deposed that there
1913. had been no dispute between the plaintiff and his employees,
LONG the dock labourers.

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James Larkin, one of the defendants, gave general evidence to show that there was a question as to the rate of wages and conditions of employment of dock labourers, and that it was agreed that a stevedores' association should be formed to enable the stevedores, by securing higher rates, to pay higher wages. He produced the minute book of the Transport Union, No. 1 Branch, and the rules of the Union in force from May, 1899, to September, 1912.

John O'Neill, the secretary of the Transport Union, proved the minutes, and deposed on cross-examination that the question of the plaintiff's action, according to the minutes, came up on two occasions, and that there were no minutes kept of the general meetings—a matter which was corroborated by the defendant Larkin when recalled.

Hopkins, defendant, deposed that there was a long-standing dispute between the stevedores and the Union as to the rate of wages and the number of men employed; that about the 23rd June he told the plaintiff that it had been agreed at a general meeting of the Transport Union that the men should not work for him unless he agreed to pay the wages and put on the complement of men required by the rules. Hopkins deposed that the general meeting took place two or three days after the 20th June; that a Mr. Jordan moved the resolution; that there was no record in writing of the meeting; that all present in favour of not working for the plaintiff were asked to show their hand, and every member present held up his hand; there was no vote against it. Hopkins further deposed that he met the plaintiff and told him what had happened, that the men could not work for him (the plaintiff), to which the plaintiff replied he would go on until he was stopped.

Hopkins deposed that on the 8th August, in pursuance of Larkin's direction, he went down to the "Sieben Jarl" and asked the plaintiff to "fall into line." The plaintiff said he would not, whereupon Hopkins said it was his duty to withdraw the men. The men were withdrawn. On the 27th August Hopkins stopped

the men working at the "Schoona," and on the 23rd September the men at work on the "Thelma" were withdrawn. Hopkins deposed that there was no threat or violence used on any occasion. On cross-examination Hopkins said that the general meeting of the union was held on the 1st July. The resolution that no one was to work for the plaintiff was passed, but the plaintiff's refusal to join the association was not discussed. When he (Hopkins) stopped the men, he stopped them because the plaintiff was not paying the proper rate of wages; he did not suggest in the case of the "Sieben Jarl" that the plaintiff was not employing the proper number of men.

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The defendant Newman deposed that there was often trouble between the stevedores and the men, and frequent strikes. That on the 27th July he met the plaintiff at Butt Bridge. He said to the plaintiff, "A good many fools live outside a lunatic asylum; and you are one of them that won't come into our association." There was no threat. Larkin's name was not mentioned. On the 17th August he met the plaintiff at Eden Quay, and had a similar conversation. On cross-examination he said that Larkin, in the plaintiff's presence, promised to give the stevedores his support, to see that there was no undercutting, and that there was a proper number of men employed, and said that he would call the men away from any stevedore who would not agree to the rules and become a member of the association. He (Newman) took no interest in the business of the Stevedores' Association.

The defendant William Long deposed that Newman gave him a copy of the rates to take to his brother (the plaintiff) at Rush. On the Saturday following that visit he first knew the plaintiff had refused to join.

At the close of the plaintiff's case Serjeant Sullivan asked for a direction for the defendants Newman, Long, and Donohoe, on the following grounds:—

(1) That there was no evidence against the defendants of the cause of action pleaded.

(2) That the defendants were entitled to agree amongst themselves as to the rates to be charged by the stevedores in the port.

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(3) That the defendants were entitled to agree with the Transport or any other union that the members of each association should work with or employ members of the other association only.

(4) That the members of each such association were entitled to notify these terms to persons affected, whether shipowners, stevedores, or labourers.

(5) That any attempted breach of this agreement by a stevedore outside the association seeking to procure union members to discharge ships against the will of the members of the association, constitutes "a trade dispute," entitling the members of the association to cause the union workmen to cease working for the stevedore, provided the action of the workman is not induced by threats or intimidation.

(6) That there was no evidence that the withdrawal of the men was affected by any threat or intimidation, or was done otherwise than in furtherance of the trade dispute existing between the allied associations and the plaintiff, owing to the plaintiff's claim to discharge with Union men, notwithstanding that his so doing would be a breach of the conditions of labour as to personnel and number of labourers agreed upon between the two associations.

Lynch, K.C., on behalf of the defendants *Larkin, Hopkins*, and *Redmond*, asked for a direction on the following grounds:—

(1) That there is no evidence proper to be submitted to the jury to sustain the plaintiff's claim.

(2) That there was a trade dispute existing at the Port of Dublin (*a*) between the members of the Irish Transport Union and the plaintiff by reason of his refusal to join the Stevedores' Association, and by reason of his refusal to accept the conditions to employ a larger number of men than heretofore, and by reason of his refusal to accept the conditions of employment laid down by the Transport Union; (*b*) between the plaintiff and other stevedores who had joined the Stevedores' Association.

(3) That there was no evidence of threats or violence by the said defendants, or any of them.

The learned judge, being of opinion that there was ample evidence of acts by each of the defendants which would have been actionable prior to the passing of the Trade Disputes Act, 1906,

considered that it lay upon the defendants to prove that such acts were done in contemplation or furtherance of a trade dispute as defined by that Act; that it was competent for the jury to hold that the only dispute was a refusal to allow dock labourers to work for the plaintiff unless he became a member of the Stevedores' Association; and that that was not a dispute within the Act, and that the case could not be withdrawn from the jury.

After setting out the evidence, the learned judge's note continues:—

“During the course of the case Mr. Serjeant Moriarty asked me to allow an amendment of the statement of claim. I thought the amendment asked for was hardly necessary, as the principal cause of action in it was the inducement of the dock labourers to break their contracts, which was also a cause of action in the statement of claim, and as the particular form of conspiracy alleged was, as to them, material only as to malice; but, as the amendment distinctly raised a point that had been relied upon all through the case, I for greater precaution allowed it, and Serjeant Moriarty now handed in the amendment, a copy of which I directed to be filed. It in substance charged a conspiracy wrongfully, and without lawful authority, to force the plaintiff to join the Stevedores' Association, and that in pursuance thereof the defendants by threats and menaces endeavoured to force the plaintiff to join that association, and procured dock labourers who were willing to work for him not to work for him, and induced labourers who had engaged to work for him to break their contracts of employment.

“I invited counsel on each side to suggest the questions they desired to leave to the jury. Serjeant Moriarty suggested the following [the note then sets out the first four questions left to the jury]. Mr. Serjeant Sullivan objects to each of these questions, as he alleges that they have no connexion with the cause of action pleaded. No other question was suggested at this stage.

“I stated that, in addition to the above-suggested questions, I should leave a question to the jury to ascertain whether the acts complained of were done in contemplation or furtherance of a trade dispute, and that, as a question might arise on the nature of the dispute, whether it was a “trade dispute,” I would frame the

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question in such a manner as to ascertain from the jury the exact nature of any dispute which they might be of opinion existed, so as to enable the Court above to determine if necessary whether such dispute was a 'trade dispute' within the meaning of the Act of 1906.

"I accordingly framed the following questions:—

"Was there, at the time of the acts complained of, a dispute between the plaintiff and the dock labourers? If so, what was the nature of the dispute? Was it (a) that the labourers insisted that the plaintiff should become a member of the Stevedores' Association, and that the plaintiff refused to do so; or (b) was it that the defendants insisted that the plaintiff should pay the same wages and exact the same conditions of employment as the stevedores had agreed to? If (b), did the plaintiff refuse to pay the same wages and exact the same conditions of employment as the Stevedores' Association had agreed to? Were the acts of the defendants done in contemplation or furtherance of such dispute?"

"Counsel for both sides suggested alterations in these questions. Mr. Serjeant Moriarty suggested that I should put the question, 'Whether the dispute was one between the plaintiff and the Stevedores' Association, into which the stevedores brought Larkin, Redmond, and Hopkins to assist them?' Mr. Serjeant Sullivan suggested that I should put the question, 'Whether the dispute arose out of the conflicting claims on the one side, of the Transport Union, to work only for members of a recognized Stevedores' Association; and, on the other side, to obtain the assistance of Union Labour in discharging ships, without joining the association?'

"Mr. Serjeant Moriarty asked me to rule that the cause of action was a 'continuing one' within the meaning of Order XXXVI, Rule 52, and that, consequently, the jury were entitled to assess the damages to the present time. I was of opinion that, as the cause of action was not the conspiracy, but the acts done in pursuance of it, the cause of action was not a continuing one; but I stated I would get the jury to assess the damages alternatively, so as to prevent, as far as I could, the possibility of a second trial. I accordingly left to the jury the questions mentioned in the associates' certificate (1).

(1) This certificate is set out, *post*, pp. 298, 299.

"Mr. Serjeant Sullivan handed in a requisition in writing requiring me to tell the jury :

"(a) That there was a dispute between the dock labourers and the plaintiff, in furtherance of which the acts complained of were done.

"(b) That this was a trade dispute regarding the conditions of labour.

"(c) That there is no evidence to sustain the matter in the questions submitted by counsel for the plaintiff as to the nature of the dispute.

"(d) That on the evidence it was established that the acts were done in furtherance of a claim on behalf of the Transport Union to have its members work only for employers who have agreed to the Union wages and conditions of employment through the Stevedores' Association.

"He also objected to the questions proposed by me, and repeated his former requisition, and objected to the question relating to a conspiracy to induce the plaintiff to join the Stevedores' Association on the grounds :

"(a) That there is no evidence to sustain any such cause of action ; and conspiracy, apart from acts causing damage, is not actionable.

"(b) Warnings or threats to the plaintiff himself are not such acts causing damage as entitle the plaintiff to sue in respect of them.

"(c) There is no evidence of threats, apart from warnings, by any of the said defendants.

"I declined to comply with this requisition. After a long interval the jury returned into Court with the answers to the questions as they appear in the associate's certificate, with the exception of the answer to question 3, to which the answer was : 'Larkin, Redmond, and Hopkins.' I pointed out to the jury that they had answered question 3 only in relation to three of the defendants ; and I sent them back, against Serjeant Sullivan's objection, to answer the question as regarded the other three defendants. One of the jury asked me : 'Have we any evidence as regards those three ?' I answered : 'If there was an agree-

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K. B. Div. ment among six, and three of them do acts in pursuance of the
 1913. agreement, the acts are the acts of six.'

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"In reference to the answer to question number 6, I pointed out to the jury that as the answer to number 5 was in the negative, question number 6 did not arise. A juror stated that the dispute negatived by answer 5 was a dispute with the dock labourers, and that they were of opinion that the dispute was with the Stevedores' Association. This statement was made in the presence of, and, as I understood, was assented to by all the jury. I understand that this accounts also for the negative answer to the first part of question 7, as the dispute therein referred to was one between the dock labourers and the plaintiff. I should have asked the jury some questions as to portions of the questions they had not answered, were it not that Mr. Serjeant Sullivan strongly objected, Mr. Serjeant Moriarty did not require me to do so, and that I thought the answers they had agreed to were sufficient to decide the case.

"The jury retired to consider their answer to question 3 as regards William Long, Newman, and Donohoe, and returned with the following answer to it:—'Larkin, Redmond, Hopkins, William Long, Newman, Donohoe.'

"On the findings of the jury, Serjeant Moriarty asked for judgment for the plaintiff for £200 damages and an injunction. I was satisfied with the findings of the jury, and stated that I would give judgment for £200 damages, and that unless the defendants undertook not to commit acts of the description complained of pending the notice to change the verdict or for a new trial, I should also give judgment for an immediate injunction.

"Some questions arose as to the terms of the injunction, and as it was now considerably after the hour until which the Court usually sat, I thought it better not to give judgment until the morning, but I discharged the jury.

"On the following morning, December 6th, Mr. Serjeant Sullivan gave me an undertaking on behalf of his clients, which I accepted. He also handed in a further requisition, which I annex. Mr. Atkinson, who was with Mr. Lynch, K.C., refused to give any undertaking for his clients, and submitted to me a requisition in writing which I annex.

"I gave judgment against all the defendants for £200, with costs, and also for the injunction included in the associate's certificate; but, in consequence of Serjeant Sullivan's undertaking, I stayed, as against his clients, execution and issue of the injunction; and I extended the time till the 21st of December for any of the defendants to serve notice to set aside the verdict."

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The following are the requisitions of Serjeant Sullivan and Mr. C. Atkinson handed in on the 6th December:—

Serjeant Sullivan:—

"Having seen the answers of the jury, I now, on behalf of the stevedore defendants, submit—

(a) That in the absence of answer to question 9 there is no complete verdict on the issues.

(b) That the answer to question 6 is a finding in law that there existed a "trade dispute" under the statute as—(1) Stevedores are persons employed in a trade or industry; (2) their dispute with the plaintiff was admittedly a dispute as to the terms upon which stevedores should accept employment from shipowners in Dublin; (3) it was, therefore, a dispute between workmen and workmen relating to their employment.

(c) On the evidence your Lordship is bound to answer question 9 in the affirmative.

(d) So answered, the verdict would be for the defendants."

Mr. Atkinson's Requisition:—

"I respectfully submit to your Lordship that the plaintiff is not entitled to judgment, and that the answer of the jury to question number 6 in itself in law is a finding that a trade dispute was in existence at the time the acts complained of in the statement of claim were done, and that in pursuance of such dispute the acts relied on by the plaintiff as constituting the cause of action herein were done and committed, if at all. I also respectfully submit that your Lordship should direct on question number 9 that the acts done by the defendants Larkin, Hopkins, and Redmond were done by them in pursuance of the dispute found by the jury to be in existence in answer to question number 6."

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The following were the questions submitted to the jury, and their answers thereto, as appearing in the associate's certificate.

1. Did the defendants, and, if so, which of them, agree to force the plaintiff to join the Stevedores' Association? Answer—"Yes, all of them."

2. Did the defendants, and if so, which of them, in pursuance of the said agreement, use threats to the plaintiff to force him to join the said association? (a) Did William Long? Answer—"Yes." (b) Did Newman? Answer—"Yes." (c) Did Donohoe? Answer—"Yes." (d) Did Larkin? Answer—"Yes." (e) Did Redmond? Answer—"Yes." (f) Did Hopkins? Answer—"Yes."

3. Did the defendants, and if so, which of them, in pursuance of the said agreement, induce or procure dock labourers who had engaged to work for the plaintiff, and were then actually working for the plaintiff, to break their contracts and leave plaintiff's employment on the "Sieben Jarl" on the 8th August; the "Sheena," 22nd August; "Thelma," 23rd September? Answer—Larkin, Hopkins, Redmond, Newman, Long, Donohoe.

4. Did the said acts cause actual money loss to the plaintiff? Answer—"Yes."

5. Was there at the time of the acts complained of a dispute between the plaintiff and the dock labourers? Answer—"No."

6. If so, was it a dispute between the plaintiff and the Stevedores' Association, into which the stevedores brought Larkin, Hopkins, and Redmond to assist? Answer—"Yes."

7. What was the nature of the dispute? Was it—(a) That the labourers insisted that the plaintiff should become a member of the Stevedores' Association, and that the plaintiff refused to do so? Answer—"No." Or (b) was it the conflicting claims on the one side of the Transport Union to work only for the members of a recognized Stevedores' Association, and on the other side to obtain the assistance of union labour in discharging his ships without joining the association? (No answer.) Or (c) Was it that the defendants insisted that the plaintiff should pay the same wages and exact the same conditions of employment as the Stevedores' Association had agreed to adopt? (No answer.)

8. If the dispute was (c), did the plaintiff refuse to pay the

same wages and exact the same conditions of employment as the Stevedores' Association had agreed to adopt? (No answer.) *K. B. Div.*
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9. Were the said acts of the defendants done in contemplation or furtherance of such dispute? (No answer.) LONG
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10. Assess the damages—(a) to the 19th August last? (Answer—£200); (b) From the 19th August to the present time? (Answer—£75.)

The grounds for the motion of the defendants Larkin, Hopkins, and Redmond were as follows:—

1. Non-direction and misdirection by the learned judge.

2. That the findings of the jury in answers to questions 1, 2, 3, and 4 submitted to them, and upon which the learned judge entered judgment for the plaintiff, were against evidence and the weight of evidence.

3. That upon the findings of the jury in answer to question 6 the learned judge should in law have entered judgment for the defendants, inasmuch as the said findings entitled the said defendants to judgment; and that upon the said findings the learned judge should have directed the jury that they should answer question number 9 submitted to them in the affirmative upon the evidence and the course of the trial.

The grounds for the motion of the defendants Newman, Long and Donohoe were as follows:—

1. That the findings of the jury are inconclusive, and, in the absence of an answer to question 9, do not amount to a verdict for the plaintiff.

2. That questions 1 and 2 submitted to the jury were irrelevant, and do not, nor does either of them, constitute any cause of action, and that the damages are assessed in respect of the matters complained of in the said questions amongst others.

3. That the addition by the jury of the names of the said defendants William Newman, William Long, and Joseph Donohoe to the answer originally given by the jury to question 3 was made by reason of misdirection of the learned judge who tried the action.

4. That the answer to question 5 was against evidence and the weight of evidence, and was perverse, and that on the evidence the jury should have answered the said question in the affirmative.

K. B. Dir. 5. That the learned judge at the trial should have directed a
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6. That the evidence established that the acts causing damage (a) were not committed by the said defendants William Newman, William Long, and Joseph Donohoe, and (b) were in fact committed in contemplation or in furtherance of a trade dispute within the meaning of the statute 6 Edw. 7, c. 47.

7. That there was no evidence of acts causing injury to the plaintiff being effected or procured by any threats or intimidation.

8. Non-direction and misdirection, and that the said verdict is against evidence, and the weight of evidence, and is perverse.

Sergeant Moriarty, K.C., Hanna, K.C., and Dockrell, for the plaintiff.

Lynch, K.C., and The Hon. Cecil Atkinson, for the defendants Larkin, Hopkins, and Redmond.

Sergeant Sullivan, K.C., Powell, K.C., and D. J. O'Brien, for the other defendants.

The nature of the arguments sufficiently appears from the judgments.

June 7.

GIBSON, J. :—

This case, an action brought by an employer against other employers and certain individual workmen for alleged unlawful combination, raises several novel and important questions as to the law of conspiracy since the Act of 1906, c. 47. In its original shape the pleading, as in *Quin v. Leathem* (1), was based on damage, the result of oppressive combination without justification. In such cause of action, neither actual breach of contract induced by the combination, nor intimidation, nor personal ill-will, was a necessary ingredient.

At the close of the defendant's case, an amendment was allowed, substituting as the cause of action a conspiracy wrongfully and without authority to force the plaintiff to join the

(1) [1901] A. C. 495.

Stevedores' Association, averring that in pursuance thereof by threats, &c., the defendants *endeavoured* (note this word) to force the plaintiff to join the said association, and procured dock labourers not to work for the plaintiff, and also to break their contracts of employment. No amendment of the defences was asked for or made. It must be taken that the original defences, so far as applicable, are available. The defence of the three labour defendants, Larkin, Hopkins, and Redmond, relied on the Trade Disputes Act of 1906; the defence of the three stevedores, Newman, Long, and Donohoe, did not; and their counsel did not put forward the statute till defendant's case had closed. I shall, however, treat any defence founded on the Act as open to the stevedores, if such defence on the evidence would be legally competent. The amendment was probably asked for with a view to keep the case clear of the statute. Harmful acts carried out by threats are not protected.

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The plaintiff, however, was not intimidated into abandoning the discharge; that was interrupted by the men being called out.

In all the cases cited at the Bar, where intimidation was relied on as supporting a right of action, the loss resulted from the success of the intimidation.

Threats not causing damage do not create civil liability, though they may give a character to the combination, and possibly aggravate damages.

I propose, first, to consider the law as it stood before the Act of 1906, and the effect of that enactment; secondly, to give a short summary of the evidence at the trial, and points then raised; and, thirdly, to discuss the questions left to the jury, with their partial answers thereto.

Much argument was addressed to the statute of 1875, which in my view is in no way connected with this case. The *Mogul Case* (1), relied on for the defendants, deals with combination which, though causing harm, was held not to be wrongful, being justified by fair trade competition. It is to be noted that in reference to the dismissal of the agents, a topic not relied on till the case reached the House of Lords, both Lord Watson and

(1) [1892] A. C. 25.

K. B. Div. Lord Morris felt a difficulty; they met it by the answer that if
 1913. the same agents were to act for trade rivals with opposing
 LONG interests, there would be a conflict of duty. The dismissal was
 v. not, therefore, regarded by them as what Lord Dunedin in the
 LARKIN. Trade Disputes Report, 1906, p. 19, styles "an ultroneous
 Gibson, J. attack."

The law as to what was not a lawful combination at the time Parliament took up the question in 1906 was settled by two decisive authorities. The first was *Quinn v. Leathem* (1), deciding that, 1, an oppressive combination to injure, occasioning actual harm, was actionable; 2, the Act of 1875 did not affect civil liability for conspiracy; 3, as the law then was, no trade dispute was there shown to exist. The decision, in which Lord Macnaghten and Lord Shand, who had voted with the majority in *Allen v. Flood* (2), concurred, reduced the effect of that case to narrow dimensions. Mr. Haldane, for the plaintiff, put forward the broad proposition that, apart from conspiracy, the defendant's acts were in themselves unlawful as acts of molestation—intimidation—oppression. Lord Brampton and Lord Lindley, with whose speeches Lord Halsbury agreed, used language importing that unjustified harm to a man's trade or business on the part of an individual would be a tort, irrespective of violation of contract; they adopted the proposition of Sir Wm. Erle. Lord Shand quoted with approval a passage from the judgment of Bowen, L.J., in the *Mogul Case* (3), apparently supporting the same position. These expressions of opinion, opposed to several of the dicta in *Allen v. Flood* (2), were themselves dicta; but the same view was taken by Romer, L.J., in *Giblan's Case* (4), and is adopted by Sir F. Pollock in his work on Torts, ed. 1908, p. 325, and in Addison on Torts, ed. 1906, p. 8. In the report of the Commission on Trade Disputes, 1906, p. 108, which was before the Legislature in framing the enactment of 1906, *Quinn v. Leathem* (1) is described as deciding (*inter alia*) "That as individuals the defendants had committed a tort by interfering with the right of the plaintiff to conduct his business as he thought

(1) [1901] A. C. 495.

(2) [1896] A. C. 1.

(3) 23 Q. B. Div., pp. 613, 614.

(4) [1903] 2 K. B., at p. 620.

fit." Lord Loreburn, in *Conway v. Wade* (1), treats the point as open; but Lord Atkinson (pp. 515-16) appears to hold that, apart from the Act of 1906, wrongful prevention causing damage without any intimidation would be actionable.

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The second House of Lords case before 1906 was the *Glamorgan Case* (2), relating to breach of contract. It is useful, not so much for the actual point decided, as for the clear pronouncement as to the limits of justification afforded by self-interest; as to the distinction between motive and intention; and as to the effect of the word "maliciously" in actions for conspiracy—a term which Lord Lindley and Lord James of Hereford thought might be discarded, as personal ill-will is immaterial, intentional harm without just cause or excuse being the gist of the action. The arguments of counsel, the speeches of the learned Law Lords, and the dissenting judgment of Vaughan Williams, L.J., in the Court below, have a material bearing on several of the contentions advanced in this case. As to what is actionable malice, Lord Halsbury said in *Trollope's Case* (3), that "to forward your own ends by destroying the rights of others was express malice."

Next: what change does the Act of 1906 make in the then existing law? Sects. 1 and 3 are conversant only with civil liability. Sect. 1 adds to the Criminal Conspiracy Act, 1875, a paragraph that an act in pursuance of a combination, if done in contemplation or furtherance of a trade dispute, is not to be actionable, unless if done without such combination it would be actionable. This, where it applies, cuts away a main proposition of *Quinn v. Leatham* (4), but would by itself give no protection where interference by an individual without justification was already actionable. Against this sect. 3 gives limited relief. It confers immunity on individuals; where the act is done in furtherance or contemplation of a trade dispute it is not to be actionable *only* on the ground of (a) inducing a breach of contract; or (b) of being an interference with trade, business, or employment; or (c) with the right of a person to dispose of his capital and labour as he wills—language which appears to accept the law as then

(1) [1903] A. C., at p. 510.

(2) [1905] A. C. 239.

(3) 72 L. T. (N. S.) 342, at p. 344.

(4) [1901] A. C. 495.

K. B. Div. being to the effect stated in the Trade Disputes Report already
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What the word "only" may embrace is a difficult question. Intimidation causing loss is plainly not protected. The acts covered by sect. 3 are acts which would have been actionable. Intimidation, abortive in result and occasioning no damage, was never an actionable tort—a matter overlooked in much of the argument before us.

What is the effect of the phrase "in contemplation or furtherance of a trade dispute"? According to defendants' case at the trial, there was an actual existing trade dispute on the 8th August. The acts requiring protection are those of that day; and the words "in contemplation" need not be considered. The definition of trade dispute in sect. 5, sub-s. 3, is wide, and extends to secondary strikes; but it is limited as regards both persons and subjects. As regards persons, it must be between (a) employers and workmen, or (b) between workmen and workmen.

"Workmen" is defined as meaning "all persons employed in trade or industry, whether or not in the employment of the employer with whom the dispute arises." The term "employed," on the context, must be read as "employed as employees." There was no argument that, as regards subject, there might not here be a trade dispute.

As to persons, the section does not cover a dispute between employers: *Conway v. Wade* (1); and here the stevedores were employers, not workmen. They contracted as contractors with the ship or cargo owners, though as agents for such owners their negligence might make the latter liable. With regard to their workmen, the stevedores were principals (2).

As to the extent of the protection afforded by trade dispute, there are two decisions, both relating to actions against individual workmen. In *Conway v. Wade* (3), on the findings of the jury, set out in [1908] 2 K. B., p. 847, it is hard to understand how the Court of Appeal there held that the vindictive and malicious conduct of the defendant was shielded by the Act. As Channell, J.,

(1) [1908] 2 K. B., at p. 850.

(2) [See *Cameron v. Nystrom*, [1893] A. C. 308.—REP.]

(3) [1909] A. C. 506.

in the Court below, observed, "The whole thing was got up for the purpose of putting this compulsion on the plaintiff." The value of the ultimate decision, for the purpose of the present case, is in the reasoning of the several Law Lords.

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The observations of Lord Loreburn (with whom Lord Macnaghten and Lord Gorell concurred) at p. 512; of Lord James of Hereford, at p. 513; of Lord Atkinson, at p. 518; and of Lord Shaw, at p. 522, indicate that the furtherance protected is bona fide furtherance of a genuine trade dispute, actual or contemplated; it is not to be a cloak or contrivance to conceal or forward other designs.

Lucas v. Nockells (1), cited by Hawkins, J., in *Allen v. Flood* (2), illustrates the same principle. *Santen v. Busnach* (3) gives no help. The decision was based on there being no conspiracy and no threat.

The law applicable, in my opinion, to the possible aspects of the case before us, is represented by the following propositions:—

1. An oppressive combination of employers against employer cannot protect itself in respect of harmful acts procured by such combination, such acts not being done in furtherance of a statutory trade dispute.

2. Where such combination, by the instrumentality of individual agents, procures the withdrawal of workmen hired or willing to be hired by the employer, such withdrawal is not necessarily *per se* as between the employer and his workmen a trade dispute, nor is such withdrawal *per se* an act, as between the same parties, in furtherance of a trade dispute, though such withdrawal may supply evidence on both points.

3. As between such combination and the employer attacked, withdrawal of labour procured by the combination through the instrumentality of a trade union or its members, clothed with immunity for tort by the statute, is not a trade dispute, and such withdrawal, considered as an act done for the combination as principals by agents, is not an act done by the combination in furtherance of a trade dispute, notwithstanding that such withdrawal might be, as between the employer and his men, a trade dispute, or an act done in furtherance of such dispute.

(1) 10 Bing. 157.

(2) [1898] A. C. at p. 20.

(3) 29 T. L. R. 214.

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As regards the combination, the factitious dispute of which they are the authors, and which but for them would not have arisen, is not a genuine trade dispute. The dispute, forged by them as a weapon to strike in illegitimate attack, cannot be turned into a shield to protect, or a screen to conceal, the nature and objects of the combination. Wrong-doers cannot profit by their own wrong. Success in procuring withdrawal is not a defence. It adds the *damnum* to complete the *injuria* necessary to the cause of action.

On the other hand, as between the employer and his workmen, the withdrawal, however artificial and dishonest in origin and cause the dispute may be, may be a trade dispute, or an act done in furtherance of such dispute. The objection that it is anomalous that principals should be liable, and the agents doing the harm should not be, is of no weight. By sect. 4, trades unions and their members are protected from responsibility for torts; but their agents may be sued: *Vacher's Case* (1), per Lord Moulton. Conversely, the principals in the combination here may be reached, though the agents, enjoying the presumption of imputed innocence, may be exempt from actionable responsibility.

Individuals, however, whether workmen or not, joining in the combination to fabricate the trade dispute, are identified with their principals, and cannot rely on the withdrawal procured by them—the striking weapon of the combination—as an act done in furtherance of a trade dispute. All the tort-feasors stand in the same position.

The above propositions pivot on the combination being essentially one of employers.

4. The defendants' proposition applicable to this case is as follows:—A combination between stevedore employers and workmen—whether originating on one side or the other, or representing concurrent agreement—that in order to meet labour claims, avoid disputes, secure stability of relations between employers and employed, the employers should federate on the basis that, 1, standard prices should be charged by them and standard wages

(1) [1913] A. C., at pp. 130, 131.

be paid by them; 2, that they would only employ union workmen; 3, that such workmen should only engage with federated employers—would be justified by legitimate self-interest; and a refusal to work in pursuance of such combination for a non-federated employer would be an act in contemplation or furtherance of a trade dispute, not only as regards the workmen, but as regards the association, treating the act as attributable to them. The statute does not confine its protection to acts done by the immediate disputants. I shall assume that this contention is well-founded, and that such a league and covenant would be justified. It tends, however, to danger of abuse; and, where employers are the promoters, the contract should be scrutinized lest it should be contrived to put unfair pressure on dissident employers for the benefit of the federating employers.

The plaintiff's case being one of oppressive combination, in pursuance of which the harmful acts were done, and the defendant's case being that such acts, done as the result of a legitimate combination, were in furtherance of a genuine trade dispute, I now take up the evidence and course of the trial, premising that my brief survey of evidence, with criticisms and arguments which might fairly influence the jury, is taken from the plaintiff's point of view, and is not to be understood as representing in all respects my own opinion. I have not dealt in detail with the defendant's case and counter-arguments, many of them weighty, as the jury might decline to accept them. My duty is confined to considering on this branch of the case whether the defendants were entitled to a direction—whether there was evidence to support the plaintiff's case. I shall for this purpose take it that the jury regarded the evidence adduced for the plaintiff as veracious and correct, and might supplement it by inferences from defendant's case, if tending to support the plaintiff.

The plaintiff, all his life a stevedore, had been regularly employed by certain firms and agents in discharging timber and general cargoes. He always paid the highest current wages, never had any dispute with his men, and the new wages list proposed on June 10th did not affect him in any way. Recalled at the close of the defendants' case, he emphatically stated that no complaint was ever made by the men or anyone representing

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K. B. Div. them that he had under-manned his ships or had started men
1913. before their proper time or had too little help on the quay—
LONG charges which, made by defendants' witnesses at the trial, do not
v. refer in any way to the wages list or any dispute founded thereon.
LARKIN. In compliance with a circular as to a proposed wages list, the
Gibson, J. plaintiff attended a joint meeting of stevedores and men at
Liberty Hall, on June 10th, at which all the defendants, save
William Long, were present. The list was produced by Larkin,
general secretary of the Union, and it was arranged that it should
be printed for consideration. Accordingly a meeting of stevedores
alone was held for that purpose on June 18th. The plaintiff did
not object to any of the terms in the list, as they did not affect
his wages or otherwise. Much of the defendant's evidence relates
to alleged insufficiency of numbers or gangs at the hatches in
discharging. The only references to numbers in the list are: "One
man one job," and "boats to be fully manned when starting."
Neither phrase relates to the strength of gangs proposed to work
each hatch. The next meeting, held on June 20th, at Liberty Hall,
was, like that of June 10th, a joint meeting of employers and men.
According to the plaintiff's witnesses he was not present; defen-
dants' witnesses say he was. On the evidence of plaintiff's witnesses,
the genesis of the Stevedores' Association is found in this meeting
of June 20th. All the defendants were there. James Long, the
plaintiff's brother—himself a stevedore who had to join the
association in the September following—says that the defendant
Newman, chairman of the meeting, said they were bound to form
an association of their own; Larkin responded that he would be
glad, and would give all the assistance in his power. Shortly
afterwards—some time in July—a book of prices was adopted by
the stevedores, and it was at first supposed that the plaintiff
would be a member of the new association. According to the
defendant Hopkins, a general meeting of the union unanimously
decided not to work for plaintiff unless he agreed to pay the
wages and to put on the complement of men required by the
rules. This meeting is supposed to have taken place on or
before June 23rd or July 1st—both dates are given. Hopkins
alleges that he told plaintiff of the decision that the men would
not work for him; the latter replied he would go on till he was

stopped. At this time the plaintiff had not refused to join the association; the alleged hostile action of the union was not based on any such refusal. No other witness speaks of this meeting, of which apparently Larkin knew nothing; the minutes of August 6th and 7th treat the question of plaintiff's stoppage as coming on then for the first time. Hopkins might be regarded by the jury as influenced by a desire to dissociate the stoppage ordered by him on August 8th from any plan of compelling the plaintiff to enter the association. Hence he was very positive that the stoppage of August 8th was caused by plaintiff not paying the proper rate of wages. Was it his idea to justify the stoppage by the resolution of the general meeting which, passed before the association was formed, could not have been connected with plaintiff's refusing to enter the association? The association having been formed in July, and having adopted a book of standard prices, it was found that the plaintiff, at first supposed to be assenting, declined to join. His brother, the defendant William Long, was sent to visit him on July 24th to procure his adhesion; he showed him the new price-book; it relates only to prices to be charged to owners. The plaintiff resolutely refused, the proposed prices being, as he thought, too high. William Long then told the plaintiff that unless he joined the association and charged the same rates (*i.e.* prices), they had arranged with Larkin not to allow men to work for him, adding, "What is it Larkin cannot do?" On cross-examination, plaintiff said his brother told him they had arranged with Larkin for an advanced scale of prices, and Larkin would withdraw men from any stevedores not joining. The plaintiff remonstrated that Larkin allowed his men to work for two men, Kinsella and Newell, not members of the association—a circumstance not elsewhere explained.

The defendant Long also said the stevedores would work together to force the rates on the shipowners (Counsel agree that the word "stevedores" in the report is a mistake). Two points may be noted as to this 24th July interview. There is no reference to any previous adjudication by a general meeting, and Larkin's help is sought and promised unconditionally long before the union resolution of August 7th.

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On July 27th the plaintiff met the three stevedore defendants at Butt Bridge, and, the plaintiff having declined to become a member, Newman informed him that Larkin had promised to assist them in every way to get their prices; if plaintiff refused, Larkin would withdraw his men. William Long's account of this interview substantially agrees. The first overt act or threat of war was on August 2nd. The plaintiff was engaged that day in discharging the "Schoona," when Hopkins, Larkin being away, apprised the plaintiff that he had orders to stop him; he did not, however, do so. No evidence was offered as to who gave this alleged order to Hopkins; it probably came from Larkin. Up to this stage a jury might hold that no real quarrel existed between the plaintiff and his labourers, and that Larkin's instrumentality was to be utilized by the association for the purpose of coercing the plaintiff. Union action first appears in a tangible form on August 6th and 7th, when meetings of the union committee purport to have been held, the proceedings thereat being recorded in the rough and formal minute-books. The hours of these meetings are not specified. Some time on the 6th (probably before the meeting of that night) as appears from what Larkin told the plaintiff at the interview of the 7th, Larkin promised the stevedores that Long would be stopped if he would not charge association rates. The circumstances of this very material interview with the stevedores are nowhere elucidated. As to what actually took place at the meetings of the 6th and 7th we have no information save what the minutes themselves purport to afford, nor is there any explanation of the variances between the rough and formal minutes, the former of which might be regarded as being more authentic.

The rough minute of August 6th runs as follows:—"Port wages and Stevedores' Association was discussed at some length. The general secretary explaining the attitude Mr. Long, the stevedore, had taken up by holding aloof from the rest of the men with the supposed intention of cutting down prices, the question of stopping the men from working for him was left over till Wednesday night."

The regular minute was as follows:—"Port wages and Stevedores' Association was discussed at some length. The general

secretary gave a report explaining the attitude Matthew Long, stevedore, had taken up by holding aloof from the rest of the association after agreeing at the preliminary meeting, the intention being of continuing his past actions of cutting down prices and limiting the number of men employed. It was agreed to go into the question fully the following night." The latter entry differs from the rough minute in the following particulars: it deals with past, not merely future apprehended, behaviour of the plaintiff in cutting down prices; it refers to the plaintiff agreeing at the preliminary meeting; and it mentions the plaintiff's limiting the number of the men employed, this last a topic much relied on by the defendants at the trial, though, according to the plaintiff, never the subject of any complaint. The question of wages, wages list, or any grievance against the plaintiff in that respect finds no place in either minute. The minutes of the 7th, rough and formal, both agree that the plaintiff was to be stopped, but the rough minute adds that the resolution was founded on Larkin's advice. The same evening Larkin directed Hopkins and Redmond to stop the plaintiff next morning; and Redmond says he knew of the resolution. Was Hopkins unaware of it? What he alleges he said to the plaintiff on August 8th (in curious contrast with the plaintiff's version of the language) is not easy to fit into the other evidence given on behalf of the defendants. On the evening of the 7th August, apparently before the committee meeting of that night, Larkin, with Redmond, interviewed the plaintiff, telling him that unless he joined the association and charged the same rates he would withdraw the men. The plaintiff's answer was that he always paid the highest port wages, and that any demand made for his men he would have to pay; the wages on Larkin's list were the same he had paid for twenty years; he was always willing to pay them, and the conditions were the same. Larkin rejoined that he had had a meeting with the stevedores the day before (*i.e.* August 6th), and had promised them to withdraw the men unless the plaintiff would charge the rates of the association. As the decision of the meeting of the 7th was not mentioned, and Larkin justified his proposed conduct by a promise to the stevedores on the 6th, the conversation with the plaintiff probably took

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place previous to the meeting of the 7th at an earlier hour. Whether this promise to the stevedores was made before or after the meeting of the 6th, Larkin was apparently sure that what he promised he could perform. It is remarkable that Larkin's threat or warning to the plaintiff on the 7th was based entirely on the plaintiff declining to join the stevedores in charging the increased prices, and not on any labour controversy between the plaintiff and his present or future employees. Undeterred by Larkin, on the following day, August 8th, the plaintiff engaged thirty-three men to discharge the "Sieben Jarl." They started at 6 o'clock, a.m., and after working $1\frac{1}{2}$ hours they were called out by Redmond, who had been present at the interview with plaintiff on the 7th, and Hopkins, the latter telling the plaintiff he would be further stopped till he joined the association—a remark which, agreeing with what Larkin had told the plaintiff in Redmond's presence the evening before, Hopkins, when examined for the defence, stoutly denied, though Redmond did not. The plaintiff's not joining the association had nothing (he asserts) to say to the stoppage, which was directed because the plaintiff was not paying the proper rate of wages. This reason does not agree with the minutes of the 6th and 7th August, which are silent as to any wages dispute with the plaintiff, and is in conflict with what Larkin had told plaintiff on the evening of the 7th August. Later on the same day (August 8th) the "Sieben Jarl" was given to the defendant, William Long, and the plaintiff lost the discharge. On August 17th Newman spoke to plaintiff in the same sense as Hopkins had done on the 8th. On the 19th August the writ was issued. The damage, the foundation of the action, was the loss incurred on the 8th. Two other vessels for which the plaintiff engaged men were stopped in a similar way in the following week and on September 23, the men being, as before, ordered out in violation of their contracts. The hiring, in all three cases, was possibly for the day only, and the plaintiff's real loss was not from interruption for a few hours, but from not being allowed to proceed with the discharge, which was taken from him and given to others. His actual money damage on the "Sieben Jarl" was probably small. The £200 awarded was apparently punitive and exemplary on account of oppressive injury inflicted on a brother employer. The notice of

motion raises no objection as to the amount of damages : Order 39, *K. B. Div.*
 Rule 3. No such question was argued, and as it is not before us 1913.
 I pass from it. It is unnecessary to go through the other evidence
 for the plaintiff in detail. The most important witness, after the
 plaintiff, was James Long, who was present at the joint meeting
 of June 20th. At this meeting no question as to the number of
 men was raised. The labourers called out were all willing to work
 for plaintiff, with whom they had no difference, and they left
 reluctantly. Kelly, a dock labourer, expressly states that it was
 the stevedores, not the men, who were asking for the increase.

At the close of the plaintiff's case, on the pleading as it then
 stood, the defendants' counsel required a direction, which the
 learned judge refused to give. I think that the case could not
 have been withdrawn from the jury then or at any stage.

Serjeant Sullivan having stated the defendants' case, evidence
 was called which I do not discuss in its particulars; the veracity
 and accuracy of the witnesses were to be judged by the jury.
 Larkin was the chief witness. According to him, he suggested on
 June 10th the formation of the association; the number of men
 engaged in discharging was discussed; the plaintiff was present
 at the meeting on June 20th, and broadly Larkin represents that
 there was a substantial controversy as to labour conditions, with
 complaints against the plaintiff from several, including the
 plaintiff's own men. He said he would call a meeting of the
 union and submit the matter to them. Could a matter of such
 importance be decided without a general meeting? Was there
 any such meeting? He gives no explanation of the orders
 given to Hopkins before August 2nd, or of the promise
 he made to the stevedores on the 6th August, or of his
 language in company with Redmond to the plaintiff on the
 7th. He avers that what he did on the 8th August was in pursu-
 ance of the August resolution. Had the committee power to pass
 such resolution? Recalled, he stated that no minutes were kept
 of a general meeting, but he was asked no questions as to the
 alleged general meeting mentioned by Hopkins. He acted, not
 under any such authority, but in reliance only upon the August
 decision. On the evidence as a whole, the view might be taken
 by the jury that the alleged labour complaints against the plaintiff

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K. B. Div. were a pretext ; the men were called out because plaintiff declined
 1913. to accept membership of the association. Larkin's pledge to the
 LONG stevedores on the 6th, his language to the plaintiff on the 7th,
 v. and the plaintiff's version, or Hopkins' remarks on the 8th,
 LARKIN. emphasized by the latter's denial, tend to support such view.
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At the termination of the defendants' case, an amendment was allowed to the effect already stated.

The plaintiff's counsel would have acted more wisely in adhering to the original pleading on the lines of *Quinn v. Leathem* (1). The amendment has caused embarrassment, and diverted much argument to irrelevant issues. The defendants' counsel again asked for a direction on various grounds ; it was again refused. It is unfortunate that, instead of the incessant hail of distracting requisitions for a direction, the defendants' counsel did not assist the judge as to the questions for the jury and their form.

The last matter to be considered is the questions and partial answers of the jury. The first four questions were framed by Serjeant Moriarty and adopted by the judge. The only objection made to them (in addition to the demands for direction) was that they had no connexion with the cause of action. Serjeant Moriarty apparently considered that affirmative answers on these questions would give him a verdict, as, in his view, they would exclude trade dispute. The learned Lord Chief Baron on his own initiative prepared several trade-dispute questions, phrased so as to ascertain the exact nature of such dispute. Serjeant Moriarty proposed the addition of the 6th question ; this was accepted.

Serjeant Sullivan suggested, but apparently did not press, a question whether the dispute arose out of conflicting claims, on the one side of the Transport Union to work only for the Association, and on the other side to obtain the assistance of Union labour in discharging ships without joining the association. This question was not put, and in my opinion it would not have tried the real issue—who were the originators of the dispute—its nature and genuineness—and whether the acts of the 8th August were, so far as regarded the defendants, done in honest furtherance.

It is agreed on both sides that the words "if so" prefixed to *K. B. Div.* question 6 must be rejected as unmeaning. 1913.

After a fresh batch of requisitions, the questions formulated on the amended pleading were, with the others, left to the jury. LONG
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The cases on both sides being of the nature described, the primary and vital question for the plaintiff, subject to proof of damage, was whether the combination was of an oppressive character within *Quinn v. Leathem* (1). That would be determined, from the plaintiff's standpoint, by the first question. The defendants' counsel did not suggest alternative or supplemental questions as to the aspect of facts they relied on, insisting that the defendants' case had been established and that plaintiff's had failed. As in *Quinn v. Leathem* (1), where the questions left to the jury were confined to ascertaining whether the plaintiff's charge of conspiracy was made out, the trial cannot be made abortive by suggesting at this stage other questions, as Lord Halsbury forcibly states in that case. In *Macdougall v. Knight* (2) and in *Seaton v. Burnand* (3) he used similar language. Indeed at no period of the argument did defendants' counsel suggest any other question, nor did they criticize the phraseology of the first or other questions as defective. Gibson, J.

I now turn to the questions.

The first omits the word "maliciously," though used in the pleading; and also does not specify the means of coercion, which admittedly was withdrawal of labour. The term "maliciously," as explained in the *Glamorgan Case* (4), signifies merely that intentional harm is inflicted without justification. As already remarked, no point was raised at the trial or before us as to the wording of the question, or as to this omission, which I only notice lest it should be supposed that I think the form of question to be correct. No exception was taken to the way in which the learned judge dealt with or explained the question. The only special requisition as to this question was, not that it was insufficient in form, but that there was no evidence to sustain it—also that conspiracy, apart from acts causing damage, is not actionable; this

(1) [1901] A. C. 495.

(3) [1900] A. C., at p. 143.

(2) 14 App. Cas., at pp. 199, 200.

(4) [1905] A. C. 239.

K. B. Div. 1913. latter an incontestable proposition, but inapplicable. Question 1 relates to the *injuria*, and does not profess to give a complete cause of action in itself. The damage founding the action is the subject of question 3.

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Question 2 is addressed to threats. Whether what was said could be properly so described largely depends on whether the words were spoken for the purpose of enforcing an illegal combination. Thus the language proved in *Quinn v. Leathem* (1) was described by Lord Halsbury and Lord Lindley as threats. Assuming that there were threats, they were immaterial. They were used before August 8th, they were addressed to the plaintiff, who was not thereby influenced, and they had no causal operation whatever in producing the withdrawal of the men.

Question 3 deals with breach of contract induced by the oppressive combination. Without any such breach of contract, deprivation of labour, so caused, would have been a tort: *Quinn v. Leathem* (1).

The answer the jury at first gave found the labour defendants guilty, they being the only parties visibly and directly engaged in the operations of the 8th August. The learned judge having explained that acts in pursuance of agreement would be the acts of all, the jury added the stevedore defendants as also guilty.

Having regard to the answer to question 1, finding, as I interpret it, an unlawful combination in the interest of the stevedores, the plenary authority vested in Larkin, the usual procedure in such strikes, with which the jury would be familiar, and the object being to deprive the plaintiff of all labour, I think the instruction of the learned judge was free from objection. Whether the day-labourers stopped were hired or prevented from engaging, the result was the same, the intention the same. Larkin and his officers were acting within the apparent scope of authority, or at least there was evidence to that effect, and the stevedore principals cannot escape or disclaim responsibility.

The fourth question, with its answer and the answer to question 10, ascertains the damage. The findings of unlawful combination against the stevedores and their auxiliaries, and of

(1) [1901] A. C. 495.

damage thus resulting, seem *prima facie* to displace the case of the interference being attributable to furtherance of a trade dispute. The acts of August 8th were, according to the above answers, done in furtherance of previous tortious combination of employers. If what occurred on the 8th could be, as regards the labourers, referred to a dispute at all, such dispute, as regards the stevedores, was the occasion and instrument of the injury—not its true cause, which is found in the original combination.

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The fifth and sixth questions and answers show that the jury considered that the only dispute was between the plaintiff and the stevedores. Larkin justifies the directions he gave to Hopkins and Redmond by the resolution of August 7th, passed on his advice some nine or ten hours before. Was there, so far as the stevedores and Larkin were concerned, a real honest trade dispute, or was the seeming dispute got up by Larkin and his assistants to carry out the stevedores' design?

Had the question been whether what was done on the 8th August was in furtherance of a dispute with the workmen, a negative answer as to the stevedore defendants and Larkin could not have been challenged. All the findings show that the acts were regarded as not in bona fide furtherance of any such dispute. If asked, the learned judge would have required an answer to question 9, where "furtherance" is specifically mentioned; but, on the answers as they stood, Serjeant Sullivan strongly objected to any further questions. It is certain how the jury would have found on question 9. Serjeant Sullivan probably acted prudently, but he can hardly rely on the absence of answer to a question on which the notices of motion even now insist, as was done at the trial, that there ought to have been a direction for the defendants. Having regard to answers 1, 3, 4, 5, 6, I think the jury clearly held that the acts complained of were acts of tortious conspiracy by employers (in my opinion outside the Act) and their assistants, and not acts in furtherance of a genuine trade dispute. If it was necessary to do so, the Court, could under our rules, draw inferences on matters not specifically found to supplement the actual answers. The verdict having the approval of the Lord Chief Baron, of pre-eminent authority in conspiracy law, and the opinion of the jury being certain, I should be unwilling to

K. B. Div. interfere with the verdict if there was evidence to support it—as I
 1913. think there was—on any technical omission or inaccuracy not
 affecting merits as appreciated by the jury and the judge.

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No distinction was attempted to be drawn between the members of the two classes of defendants, and there is, I think, no such distinction. If there was a distinction as regards any of the labour defendants, such as Hopkins and Redmond, that might not affect the substantial result, as all the defendants were properly made parties, and even if some were successful the plaintiff might possibly, in accordance with recent decisions, e.g., *Bullock's Case* (1), be entitled to add their costs, if they were not deprived of costs by special order, to his own, and recover the same against the other defendants.

The jury having been discharged, on the following morning counsel administered a parting and final set of requisitions on the answers. These, as before, were rejected, and again, I think, rightly,

The case, of immense commercial and legal importance, is difficult in all its aspects. For the defendants' view of the situation there was perhaps much to be said; and for a considerable time, though not thinking the defendants could be entitled to judgment, I inclined to a new trial. Careful examination, however, of the evidence and course of the trial, and study of the relevant authorities, have led me to the conclusion that the verdict and judgment for the plaintiff cannot be interfered with, there being evidence to found the verdict, and no misdirection disclosed in the charge, to which no exception was taken on any of the issues on which the verdict was based.

No complaint is made in either of the notices of motion as to the injunction or its terms; no such question was argued. I do not deem it necessary to deal with it.

I add a note. The judgment I have read was prepared by me last sittings when, as the result of conference between the members of the Court, I understood that we were agreed. On the very day, however, before his lamented death, my brother Wright, who had been engaged up to that for some weeks in the exacting duties

of Nisi Prius, wrote from his country residence to Mr. Justice Kenny that he had changed his mind. My brother Kenny having communicated with me, at once sent a reply that, in consequence of the new and unexpected situation, we should meet and have an interchange of views, as is usual when there is or may be a disagreement between the judges; but my brother Wright had unfortunately passed away before the letter was delivered. What his ultimate conclusion would have been I cannot say. He had no opportunity of considering my judgment and its reasoning. From his notes it would seem that, at the time of writing, he thought that there was a trade dispute, in furtherance of which the acts complained of were done, and that there should be judgment for the defendants, not merely a new trial.

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The jury in this case have found that there was a conspiracy on the part of all the defendants to force the plaintiff to join the Stevedores' Association; that in pursuance of that conspiracy threats were used to the plaintiff; that dock labourers who were working for him were induced to break their contracts and leave his employment; and that these acts of the defendants caused money loss to the plaintiff. The jury further found that at the time of the acts complained of there was a dispute between the plaintiff and the Stevedores' Association, into which the stevedores had brought the defendants Larkin, Hopkins, and Redmond to assist, and that there was no dispute between the plaintiff and the dock labourers. They added,—in reply to another question as to the nature of the dispute,—that it was not one in which the labourers were insisting on the plaintiff becoming, and the plaintiff refusing to become, a member of the Stevedores' Association.

Other questions, in substance largely alternative, as to the nature of the dispute were left unanswered.

There are two distinct sets of defendants,—on the one hand, three stevedores; on the other, three dock hands, including a man named Larkin, who is the secretary of a body of quay labourers known as the Irish Transport Union, and who has been represented as a person of very considerable power and authority in all trade disputes in the Port of Dublin, and as being capable

K. B. Dir. of controlling and, if necessary, diverting the labour supply. It
 1913. is important to note this separation of interests, having regard to
 LONG the findings of the jury.

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Each set of defendants has been separately represented in this action, each has put in a separate defence, and each has served a separate notice of motion impeaching the verdict. The notices ask that the judgment may be entered for the defendants, or, in the alternative, for a new trial. The broad questions we have to consider are whether a verdict for the defendants should have been directed and, if not, whether there was evidence to support the findings of the jury.

The case is a very important one from the points of view of both employer and employed—involving, as it does, questions as to the legality of acts which are alleged to invade unjustifiably the civil rights of another,—the effect of such acts when done by several in combination,—and the protection which the Trade Disputes Act, 1906, for the first time afforded to acts done in furtherance of a trade dispute. These questions have been the subject of consideration by the House of Lords in *The Mogul Case* (1) in 1892; *Allen v. Flood* (2) in 1898; *Quin v. Leathem* (3) in 1901; *The Glamorgan Case* (4) in 1905; and *Conway v. Wade* (5) in 1909; and while it is sometimes not a very easy task to reconcile certain of the judgments when one is seeking for uniformity in the grounds and reasons on which they are based, large principles have been laid down which cannot fail to afford a guide in cases of a similar or analogous character.

The action was tried before a judge of exceptional experience, the hearing extended over five days, and, if one may judge by the number of requisitions made by counsel during and at the close of the case, no point that was raisable was overlooked. In that view, it is not unimportant that the Lord Chief Baron in his report has declared himself satisfied with the findings of the jury; that he expressed the opinion at the close of the plaintiff's case that there was ample evidence of acts by each of the defendants

(1) [1892] A. C. 25.

(2) [1898] A. C. 1.

(3) [1901] A. C. 495.

(4) [1905] A. C. 239.

(5) [1909] A. C. 506.

which would have been actionable prior to the passing of the Trade Disputes Act, 1906, and that a refusal to allow dock labourers to work for the plaintiff unless he became a member of the Stevedores' Association was not a trade dispute within the meaning of the Act. He emphasized his approval of the verdict by granting an injunction.

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In dealing with the separate interests of the two sets of defendants it should not be forgotten that, although at the Bar their contentions were identical, the stevedore defendants did not in their statement of defence rely on the Trade Disputes Act.

It is quite unnecessary that I should refer at any length to the facts of the case as disclosed in the evidence. They have been dealt with very exhaustively by my brother Gibson, and I agree with the inference he has drawn. The facts raise two distinct main questions,—the one, whether, if the Trade Disputes Act were not invoked, the verdict is sustainable; and the other, whether the statute applies, and what is its effect. The former involves the consideration of the state of the law before the passing of the statute,—the findings of the jury,—and the cogency of the evidence. The other main question requires a determination on the nature of the dispute, as found by the jury, and the circumstances under which it arose and was conducted.

It has not been disputed in the course of the arguments before us, and could not be having regard to the dicta in the speeches in the House of Lords in the cases I have mentioned, that, inasmuch as damages are recoverable for breach of a contract, such breach is unlawful in the sense explained by Lord Lindley in *Quinn v. Leathem* (1), and, being unlawful, the act of anyone inducing or procuring such breach is also unlawful and consequently actionable where damage has been sustained. If several persons combine to induce or procure such breach, each of them makes himself liable to an action for what is a tortious act and can be proceeded against by way of action for conspiracy. In such an action the gist of the action is not the conspiracy, but the wrongful act done in pursuance of it, namely, the inducing or procuring of the breach of contract. It is, I think, unnecessary for the purposes of

(1) [1901] A. C. 495, at p. 535.

K. B. Div. the present case to consider in what circumstances conspiracy
 1913. would be the basis and gist of an action, or in what circumstances
 LONG a combination of two or more persons to do a certain act could
 LARKIN. alter the character of the latter and render actionable in the case
 of several what would be innocent in the case of a single person.
 Kenny, J. The action here is in the form of conspiracy for combining to
 induce workmen of the plaintiff to leave his employment, or, in
 other words, to break their contracts with him, and also for com-
 bining to induce workmen to refuse to work for him,—and the
 overt acts alleged are that the defendants did induce such work-
 men to leave his employment and to refuse to work for him.
 That is the real cause of action, although by the amendment
 made at the trial the true issues have been somewhat obscured.
 The answers to the questions put by the learned Chief Baron are,
 it seems to me, as applicable to the original cause of action as
 stated in the statement of claim as to the amendment and enable
 a determination to be reached no matter from what point of view
 the case be regarded.

If the evidence supports these answers, the case is simply one
 of a combination for inducing or procuring the breaking of con-
 tracts, followed by damage to one of the contracting parties.
 Whether the act of inducing or procuring be that of a single
 individual or of a number of individuals in combination, it is a
 tortious act,—unlawful and actionable if committed without
 justification: *Quinn v. Leathem* (1); *The Glamorgan Case* (2). It
 was argued that this case and the *Mogul Case* (3) were not
 dissimilar, and that the defendants here were acting merely in
 their own interests and within legal bounds. But in the *Mogul*
Case (3) the defendants were acquitted of having resorted to any
 unlawful means in order to accomplish their objects, and it is
 manifest that if it had been established in that case that the
 defendants had endeavoured to procure the breaking of contracts
 the result would have been different. The *Glamorgan Case* (2)
 is as striking a one of self interest as the *Mogul Case* (3), and its
 decision leaves no doubt upon the law that no matter what the

(1) [1901] A. C. 495.

(3) [1892] A. C. 25.

(2) [1905] A. C. 239.

motive of the defendants be,—no matter how bona fide and free from malice or ill-will it may be,—if, in endeavouring to attain their object, whether that object be a selfish and personal one or of a broader character, they purposely procure or induce an unlawful act, such as the breaking of contracts, to be committed, they are guilty of an actionable wrong. It is said that in the present case breaches of contract were not contemplated because it was considered that there would be no contracts entered into by the dock labourers; but such a contention is an idle one in the face of what actually occurred, for the men were ordered out when they were in the very act of the discharge to which their hiring related.

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On the question of justification for their action, the *Glamorgan Case* (1) is a direct authority. A *prima facie* actionable wrong was committed in that case, just as one is alleged to have been committed in the present, and it was sought to be justified on the ground that the defendants' federation or council who had directed and ordered the strike that involved the breach of the miner's contracts had in so doing acted honestly, without malice, and with the object only of keeping up the price of coal by which their wages were regulated. So far as the motive of self-interest was concerned that case was on the same plane as the *Mogul Case* (2), but differed from it in the methods employed to carry out the defendants' object. It was not denied that there might be some cases of a very special character which would afford a justification for that which in itself was an actionable wrong; but even in a case in its facts so strongly founded on good faith and the absence of indirect motive as the *Glamorgan Case* (1), the House of Lords were unanimous in holding that there was no lawful excuse or justification for the interference with contractual relations. The present case seems to me to be an *a fortiori* one.

I take the two findings of (1) combination and (2) the objects and methods of the combination. It would appear that there are fourteen stevedores in the port, and at the meeting of the 10th June, held at the office of the Transport Union, thirteen

(1) [1905] A. C. 239.

(2) [1892] A. C. 25.

K. B. Div. out of the fourteen attended, of whom the plaintiff was one. All
 1913. the defendants but Long were there. The defendant Larkin was
 LONG the leader of the dock labourers, and seems to have taken the
 v. leading part at all meetings that he attended. I shall assume
 LARKIN. for the purposes of argument that his object and that of the
 Kenny, J. members of his union, in the course which they advised and took,
 were to better the position of the dock labourers. At this meeting
 of the 10th June, a list of rates payable by the stevedores was
 produced by Larkin, and discussed. Larkin says that a difficulty
 arose as to adopting these rates without some corresponding
 increase to the rates charged by the stevedores to ship-owners
 or consignees, and he suggested that an association of stevedores
 should be formed, for the purpose, I presume, of effectually dealing
 with the ship-owners and consignees. The plaintiff says that on
 the 18th June he attended a meeting of stevedores at Shaw Street,
 at which the defendants Larkin, and Newman and Donohoe—both
 stevedores—were present, Newman being in the chair. The
 plaintiff alleges that at that meeting he said that the new rates
 of wages and terms of employment did not affect him, and that
 he “had no further interest in it.” He says he attended no other
 meeting, though Larkin, Hopkins, Redmond, and Newman swear
 he attended one on the 20th June at the offices of the Transport
 Union. None of the defendants depose to any meeting of the
 18th June, but Newman speaks of a stevedores’ meeting of
 the 17th June. Larkin and Hopkins say that at the meeting of
 the 20th June there were twelve stevedores, including Newman.
 At that meeting Newman also suggested an association, and
 Larkin says that there was a discussion as to what would happen
 if all the stevedores did not join. Newman says that the plaintiff
 fought Larkin, but that they came to an understanding. He
 adds that “afterwards we agreed to form an association.” Sub-
 sequently to the 20th June the suggested association seems to
 have been formed, and it appears from Hopkins’ evidence that
 there were either one or two meetings of the Transport Union
 between the 20th June and 1st July at which a resolution was
 passed that no one was to work for the plaintiff.

There are no minutes or copies of this resolution. Hopkins
 swears that plaintiff’s not joining the association had nothing

to say to it, and that the men were subsequently stopped because plaintiff was not paying the proper rate of wages. But on the 24th July the plaintiff's brother, the defendant William Long, came to see him at Rush where he lived, saying he was sent by Newman, and asked plaintiff to join the association, and, on the plaintiff's refusal to do so, told him that unless he joined and charged the same rates as those which it was proposed the other stevedores should charge, he, the plaintiff, would get no men to work for him, as they had made an arrangement with Larkin not to allow the men to work for him. On plaintiff remarking that this was all nonsense, Long replied, "What is it Larkin cannot do?" Furthermore, Newman admits that on the 27th July he met the plaintiff at Butt Bridge, the defendants Long and Donohoe being, according to plaintiff, present, when Newman said to plaintiff, "A good many fools live outside a lunatic asylum, and you are one of them that won't come into our association." The plaintiff swears that on that occasion Newman told him he'd get no men to work for him, as Larkin had promised to assist them in every way to get their prices, and if plaintiff did not join he (Larkin) would withdraw the men from him. Newman also deposes that Larkin said he would call the men away from any stevedore who would not agree to the rules and become a member of the association. On the 1st July, according to Hopkins, there was a general meeting of the Transport Union, and on the 2nd August Hopkins told the plaintiff he, as a delegate of the union, had got orders to "stop him" in discharging the "Schoona," which was then in port. On the 7th August a resolution,—of which the minutes are in evidence,—was passed at a meeting of the union, that no member be allowed to work for the plaintiff and that the union officials be instructed to that effect, and on the evening of that day the plaintiff saw Larkin and Redmond, when the former said he had had a meeting with the stevedores the day before, that is on the 6th August, and had arranged to assist them in every way and had promised them to withdraw the men from the plaintiff unless he would charge the rates of the association. On the next day, the 8th August, when the plaintiff was in the course of discharging a ship called the "Sieben Jarl," the defendants Redmond and Hopkins came

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K. B. Div. down, and Hopkins ordered the men off and said the plaintiff
1913. might make up his mind that he would be further stopped until
LONG he joined the association. The men left the ship at once in
v. obedience to Hopkins' orders. Larkin admits that on the
LARKIN. 7th August he gave orders to Redmond and Hopkins for the
stoppage of this ship. The writ of summons in this action
Kenny, J was issued on the 19th August, and on two subsequent dates the
discharge by plaintiff of two other ships was also stopped.

On this evidence I am of opinion it is impossible to say that the jury had not materials on which they could reasonably conclude that a combination—an agreement, a conspiracy—existed, and that its object, purpose, and aim were primarily to compel the plaintiff to become a member of the Stevedores' Association, and, in furtherance of that end, to use unlawful means. To my mind, it does not matter whether the unlawful means be regarded as one of the objects, purposes, or aims of the conspiracy, or as one of the means by which its primary intent was to be carried out. The jury did not believe that the object of the conspiracy was simply to compel the plaintiff to pay higher rates of wages. The evidence I have referred to is full of reference to "joining the association," and each one of the defendants is, though in different degrees, brought into connexion, more or less active, with the combination. It is admitted that the Transport Union,—that is, the defendants Larkin, Hopkins, and Redmond,—did stop the discharge of the "Sieben Jarl" on the 8th August. Donohoe, who has not given evidence in the case, was at the meetings of the 10th and 18th June, and he was one of the three stevedores who met the plaintiff on the 27th July when Newman either threatened or warned the plaintiff. Newman's conduct shows him to have been an active participant in the movement to influence unduly the plaintiff, and Long also took a somewhat prominent part. I have, therefore, arrived at the conclusion that, apart from the principle that each person engaged in a conspiracy is liable for the acts of a co-conspirator provided such acts are within the scope of their agreement and in furtherance of the common design, there is evidence directly to connect each of the defendants with the latter. But once the principle of combined intent is applied, it seems to me impossible to avoid saying that

the three stevedore defendants are liable in respect of the overt acts committed by the members of the Transport Union. The latter were their instruments for effectually working out the original design.

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I have already dealt with the evidence of the actual carrying into effect of the defendants' objects. On the question of damage to the plaintiff, there was ample proof.

There is another aspect of the case. If it were one not depending on the procuring of breaches of contract by the plaintiff's men, but resolved itself into one of molesting and harassing the plaintiff in the pursuit of his business, I am clearly of opinion that an action lies in respect of a conspiracy with that object, where loss has been suffered. In *Quinn v. Leathem* (1) there was a conspiracy to wrong the Lisburn butcher in various ways, and the cause of action was dealt with as founded on an oppressive combination to injure, without justification. At p. 525 of the report, Lord Brampton, speaking of the cause of action, says—"It is not dependent upon coercion to break any particular contract or contracts, though such causes of action are introduced into the claim; but the real and substantial cause of action is an unlawful conspiracy to molest the plaintiff, a trader, in carrying on his business . . ."; and at p. 530, in dealing with such a conspiracy, he says:—"It must be borne in mind that a conspiracy to do harm to another is, from the moment of its formation, unlawful and criminal, though not actionable unless damage is the result." So whether the procuring of breaches of contract be the foundation of the action for conspiracy, or whether it be oppressive combination to injure, it seems to me that *Quinn v. Leathem* (1) authoritatively decides that in either case the cause of action lies where damage has been suffered. Indeed, in *Quinn v. Leathem* (1), Lord Lindley went a step further and expressed the clear opinion (p. 537) that, in certain circumstances, if what the defendants had done in that case had been done by a single individual, he would have committed an actionable wrong.

On this branch of the case it is not unimportant to observe that counsel in his reply confined his argument to the effect of the

(1) [1901] A. C. 495.

K. B. Div. Trade Disputes Act of 1906, and admitted that in the absence of
 1913. the Act his clients would have no case, having regard to *Quinn v. Leathem* (1).

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The remaining question for consideration is that of the effect of that statute. In order that a case may come within its shelter the "trade dispute" must be one between employers and workmen, or between workmen and workmen, and the act complained of must be done in contemplation or furtherance of such dispute, and must be confined to cases of inducement to breaches of contract or to such interference as is mentioned in the third section of the Act. The jury have found that the dispute was one between the plaintiff and the stevedores; that the latter had brought the defendants Larkin, Hopkins, and Redmond into it; and that there was no dispute with the dock labourers. They further found that it was not a dispute in which the labourers insisted on the plaintiff joining, and in which the plaintiff refused to join, the stevedores. If that finding be warranted by the evidence, as I hold it was, it establishes that the dispute was one between the employers, and not one between employers and workmen or between workmen and workmen. The stevedores were employers of labour who would seem to have had no quarrel, and not even a dispute, with those whom they employed; but it was thought desirable by those who controlled the Transport Union to suggest to the stevedores as employers the starting of an association of stevedores, in order to obtain higher rates from ship-owners and consignees, and thereby enable the stevedores to extend what, the union considered, would be better terms to the dock labourers. The suggestion was adopted, and apparently every stevedore except the plaintiff joined it. He steadily refused to do so, and in my opinion there was ample evidence, on which the jury might reasonably act, that the pressure brought to bear on him was solely with the object of forcing him into the association. It was the joining or not joining the association that was the subject-matter of the controversy. With whom was the controversy? The jury have found it was between the plaintiff and his brother stevedores, and that there was no dispute with the labourers. It

seems to me that the evidence of the defendant Newman, one of the stevedores, was of itself sufficient to justify this conclusion. Members of the Transport Union, notably the defendant Larkin, became the willing instruments of pressure, and used the special power which their union or their individual influence afforded of endeavouring to force the plaintiff into the new association. They acted as the sympathizers, associates, and agents of the stevedores in a dispute to which they were not parties, and which dispute was one only amongst employers. I am therefore of opinion that the dispute is not one that is protected by the Act.

But even if it could be regarded as a dispute within the definition clause of the statute, I entertain no doubt that the acts complained of are outside of the third section. To be protected by that section, they must be acts done in *contemplation* or *furtherance* of a trade dispute. In *Conway v. Wade* (1) it was held that acts which constituted or were accompanied by threats or amounted to violence could not be regarded as being within the section. The statute could not have meant to uphold a dishonest furtherance of a trade dispute. In my opinion the present case goes far beyond the circumstances in *Conway v. Wade*, and discloses the committal of acts amounting to tyrannous oppression of a very unlawful and dishonest character.

I concur in thinking that the motion should be refused.

The defendants appealed (2).

Serjeant Sullivan, K.C. (with him *Powell, K.C.*, and *D. J. O'Brien*), for the defendants Long, Newman, and Donohoe; and *Ronan, K.C.* (with him *Lynch, K.C.*, and the *Hon. Cecil Atkinson*), for the defendants Larkin, Hopkins, and Redmond:—

The two general grounds on which the plaintiff's claim is based are:—First—He claims damages for conspiracy on the part of the defendants to force the plaintiff to join the Stevedores' Association; and, secondly, he alleges that the defendant caused a breach of contract by the workmen employed by the plaintiff,

(1) [1909] A. C. 506.

(2) In the Court of Appeal, before O'BRIEN, L.C., and HOLMES and CHERRY, L.JJ.

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because he says the defendants called out such workmen when actually engaged at their work. There is no such action as an action for mere conspiracy. "I then eliminate the conspiracy as a part of the substantial cause of action, and use it for the purposes for which only, in such an action, it is available, viz.: 1, as making the defendants *jointly* responsible for the acts done in pursuance of it; and 2, as indicating the alleged malicious or wrongful intention which governed those acts . . . If anything is well settled in law, it is that in cases of this description, in which the old writ of conspiracy did not lie, the *gist* of the action is not the conspiracy itself, but the wrongful acts done in pursuance of it": Per Palles, C.B., in *Kearney v. Lloyd* (1), at p. 280. The same proposition is laid down by Lord Holt in *Saville v. Roberts* (2) in even stronger terms—"An action will not lie for the greatest conspiracy imaginable, if nothing be put in execution; but if the party be damaged, the action will lie. From whence it follows that the damage is the ground of the action." *The Mogul Steamship Co. v. McGregor* (3) and *Allen v. Flood* (4) are also authorities. This case is not within the authority of *Quinn v. Leathem* (5), because the jury have not found malice, nor have they found there was any agreement entered into by the defendants either to do an unlawful act, or to do a lawful act by unlawful means. In fact, this case is not encumbered by any necessity of considering whether the agreement entered into had for its purpose the injury of the plaintiff or any other man; there is not a shadow of foundation for the suggestion that it was made for any purpose except to benefit the parties to the agreement themselves. [They referred to the judgments in *Mogul Steamship Co. v. McGregor*, at pp. 42, 47, and 50, and *Allen v. Flood*, at pp. 98 and 179.] The *Mogul Case* settles that no action for conspiracy will lie against persons who act in concert to damage another, and do damage him, if they merely exercise their own rights, and do not infringe the rights of other people: *Quinn v. Leathem* (5), at p. 539, per Lord Lindley. There is no evidence here that the stevedores entered into any agreement that persons who were working for the plaintiff or any other person should be

(1) 26 L. R. Ir. 268.

(2) 1 Ld. Raym. 374.

(3) [1892] A. C. 25.

(4) [1898] A. C. 1.

(5) [1901] A. C. 495.

stopped while working. Neither is there evidence that any stevedore was forced to join the Stevedores' Union; and certainly there is no evidence that plaintiff himself was forced to join the Union by unlawful means. This case is a blank, for there is no finding of malice, and it is therefore not within the authority of *Quinn v. Leathem* (1). What are called threats here were nothing more than friendly advice. An assertion by the Transport Union members that they would not work for anyone unless he was a member of the Stevedores' Union was perfectly lawful, and was not a threat. "It is undeniable that the terms 'threat,' 'coercion,' and even 'intimidation' are often applied in popular language to utterances which are quite lawful and which give rise to no liability either civil or criminal. They mean no more than this, that the so-called threat puts pressure, and perhaps extreme pressure, on the person to whom it is addressed to take a particular course": per Lord Herschell in *Allen v. Flood* (2), at p. 129. The finding of the jury that threats were used should be set aside, as there is no evidence to support it.

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To maintain the action, plaintiff must prove wrongful acts, causing damage. The only wrongful acts suggested here are that some of the defendants called off the dock labourers while at work for the plaintiff, and thereby procured a breach of contract; but these labourers are only employed for four-hour shifts, and when the men came off, the evidence is that they had practically completed their shift, and that their contract was completed; but, apart from this, the direction of the learned Chief Baron was wrong as regards the three Stevedore Union defendants, for there is no evidence that they had anything to say to the men being called off. In addition, the plaintiff has not suffered any damage by the men so leaving.

No action can lie, because the facts of the case are covered by sect. 3 of the Trade Disputes Act, 1906. There is a "trade dispute" within the meaning of that Act. The Transport Union men refused to work for any stevedore unless he was member of the Stevedores' Union, and their object in doing this was to improve their own position. That is a clear trade dispute.

We say also that because of questions 8 and 9 not being answered by the jury, as well as by the incomplete answer to

(1) [1901] A. C. 495.

(2) [1898] A. C. 1.

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question 7, the trial is unsatisfactory and indeterminate, and on this ground alone we are entitled to a new trial.

Further, evidence of acts subsequent to the issue of the writ was improperly admitted, and it is impossible to say that the amount of damages found by the jury was not based upon this improper evidence.

[They also referred to the following authorities:—*Conway v. Wade* (1); *Giblan v. National Labourers' Union* (2); *Jose v. Metallic Roofing Co. of Canada, Ltd.* (3); *Holmes on the Common Law*, p. 142; *Jenks' Short History of the English Law*, 334; *Hardcastle on Statutes* (2nd ed.), pp. 465, 466.]

The Attorney-General (Moriarty, K.C.), and Hanna, K.C.
(with them *Dockrell*), for the plaintiff.

Quinn v. Leathem (4) is wholly applicable to this case, and we rely on it. The findings of the jury show that we have satisfied them that the whole of the defendants agreed together to force the plaintiff to join the Stevedores' Union. [They referred to the judgments in *Quinn v. Leathem* (4) (Lord Halsbury), pp. 506, 508, (Lord Macnaghten), p. 510; and also referred to *Lumley v. Gye* (5).] Unless the Trade Disputes Act, 1906, applies, the plaintiff has a good cause of action for conspiracy on the authority of *Quinn v. Leathem* (4). But the Trade Disputes Act, 1906, does not apply, for the finding of the jury that this was a dispute between the stevedores and the plaintiff, who is a stevedore also, prevents that statute applying. To constitute a dispute within the meaning of the Act, the very words of the section show that the plaintiff must satisfy the jury that it was a dispute between employers and workmen; the jury have found the very contrary to this. [They referred to the definition of "Trade Dispute" in sect. 5, sub.-s. 3, of the Trade Disputes Act, 1906.] A dispute between two or more stevedores is not a trade dispute, for a stevedore is not a "workman" within the section. The word "workmen" is defined as meaning "all persons employed in trade or industry"; a stevedore might be "employed"

(1) [1903] A. C. 506.

(2) [1903] 2 K. B. 600.

(3) [1905] A. C. 514.

(4) [1901] A. C. 495.

(5) 2 E. & B. 216.

in the popular and loose sense of the word to unload a vessel, but in the sense of the distinction drawn in the section itself, the dock labourers are the "workmen" and the stevedores are the "employers"; stevedores are really contractors. We say the Trade Disputes Act, 1906, cannot therefore apply to this case, having regard to the findings of the jury as to the persons who had that dispute. The plaintiff has then a good cause of action for conspiracy. "Conspiracy" includes two things, first, an agreement to do an act that is unlawful; and secondly, an agreement to do a lawful act by unlawful means. The defendants have entered into an agreement to do an unlawful act, namely, to coerce the plaintiff to join the Stevedores' Association, and they have also proceeded to carry out their agreement by unlawful means, because they used not only threats, but they called out the workmen employed by the plaintiff while they were actually at work, and before they had completed the time for which they had contracted to work. Plaintiff swears he engaged them for the whole discharge of the ship, but in any event they were engaged for at least a half-day, and they were called off by defendants or their agents before that period was completed. *Conway v. Wade*(1) applies. Conspiracies in restraint of trade are more strictly controlled by the law than are other conspiracies. A trader has a right to trade without unlawful interference, and there is a correlative duty on others not to interfere with his trade so as to injure him.

The evidence of acts subsequent to the issue of the writ was properly admitted, because the plaintiff claimed an injunction to restrain the defendants from repeating the acts in addition to his claim for damages, and the learned Chief Baron at the trial told the jury they could not give damages in respect of these subsequent acts. [They also referred to *Kearney v. Lloyd*(2); *Mogul Steamship Co. v. McGregor*(3); *Leatham v. Craig*(4); *Temperton v. Russell*(5); *Giblan v. National Labourers' Union*(6); *O'Keefe v. Walsh*(7); *Read v. Stonemasons' Society*(8); *Sanken v. Busnach*(9).]

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(1) 1909] A. C. 506.

(2) 26 L. R. Ir. 268.

(3) [1892] A. C. 25.

(4) [1899] 2 I. R. 667.

(5) [1893] 1 Q. B. 715.

(6) [1903] 2 K. B. 600.

(7) Unreported.

(8) [1902] 2 K. B. 732.

(9) 28 T. L. R. 515.

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Serjeant Sullivan, K.C., in reply :—

The dispute was really between the plaintiff and the members of the Transport Workers' Union. The actual words of the section are "disputes connected with the employment or non-employment of *any* person," or the "terms of employment or conditions of labour of *any* person." The word "workmen" is defined by the section to mean "all persons employed in trade or industry." That description includes a stevedore such as the plaintiff. [He referred to *Jones v. Spencer* (1).]

Cur. adv. vult.

Dec. 19.

O'BRIEN, L.C. :—

The Court is asked in this case either to direct a new trial or to enter judgment for the defendants. The action was brought by Matthew Long, a Dublin stevedore, against three members of a body called the Stevedores' Association, and three members of the Irish Transport Workers' Union, to recover damages alleged to have resulted from unlawful combination entered into between all the defendants. The case occupied several days at hearing before the Lord Chief Baron and a Dublin special jury, and no legal point bearing on the law or evidence seems to have escaped the very eminent counsel who appeared either for the plaintiff or defendants. As introductory to the view which I take, I wish to say a few words applicable, as I consider, to all applications like the present, and which ought not to be forgotten. I do so even though it may seem reiterating elementary principles. In this, and like cases, a jury chosen from the non-legal community are sole judges of the facts, but guided in arriving at a conclusion by the directions of the judge, and it is not for the judge who presides, or any Court, to usurp the constitutional functions of the jury. Unless the judge has misdirected the jury on a question of law, or the jury have drawn such inferences of fact as were unreasonable or unjust to be drawn, the Court ought not to, and cannot, interfere.

My justification for referring to first principles is this: that while I feel there was much in the argument of Mr. Ronan with

regard to combination amongst workmen, and the effects of the Trade Disputes Act, with which, in the abstract, I might feel disposed to agree, and many topics were touched on by Serjeant Sullivan which, had I been a jurymen, might have appealed to me, I must not forget that my functions as a judge are limited, and that I cannot take the place of a jury, or decide legal propositions which, having regard to the legitimate findings of a jury, do not arise.

The plaintiff, and three of the defendants, Newman, Long, and Donohoe, carry on individually a business which comprises very few persons in Dublin. They undertake to discharge ships' cargoes by contract with the shipowners or others, generally for a fixed sum, while they employ the necessary labour for that purpose, themselves paying wages to the workmen so employed. Being a limited trade, it is the interest of the members that the number of persons carrying it on should not be so large as to cause undue competition, but until recently there was not any organized association of stevedores; such was formed at some date prior to 8th August, 1913. Larkin, Hopkins, and Redmond are members of a trade union, one of whose objects it is to maintain certain standards of wages and conditions of employment. The plaintiff, although he was at first willing to become a member of the Stevedores' Association, subsequently refused to do so, and he endeavoured in the months of August and September last year to discharge several cargoes, employing dock labourers, most of whom, if not all, were members of the Irish Transport Union. On the 8th of August, some short time after he had commenced to discharge a ship called the "Sieben Jarl," the defendants Redmond and Hopkins ordered all the men employed by him, and then working, to cease working, and informed him that he would be further stopped unless he joined the Stevedores' Association. The men ceased to work and the plaintiff suffered loss. Further evidence, admissible for the purpose of sustaining an injunction, was given, showing that at later dates a similar course of conduct was pursued. I have stated these facts in the baldest way, so as to keep as free as possible from controversial matter.

Now, the plaintiff's case was that Newman, Long, and Donohoe

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agreed between themselves and the other three defendants to compel him to join the Stevedores' Association, which legally he was entitled not to join if he so willed. Secondly, he avers that in pursuance of this agreement each of the defendants induced his labourers to do an illegal act, that is to say, to break their contract with him, and thereby to compel him to join the association. He negatives any dispute or controversy with the Transport Union, and says that his only dispute was with his fellow-stevedores.

The defendants' case, if I understand it rightly, was this, that if all the circumstances of the case are looked at this was not such a dispute as plaintiff alleges, but was a trade dispute in which the disputing parties were really the plaintiff and the Transport Union; that the introduction of the Stevedores' Association was merely a detail in this dispute; and the three defendants, members of the Transport Union, aver that as a fact there was no contract broken, and that as a matter of law they are entitled to the protection of the Trade Disputes Act, 1906. The other three defendants deny that there was evidence of any illegal act by them, and they claim in addition, though not pleaded, protection indirectly through the defence relied on by Larkin, Hopkins, and Redmond.

Let us now see whether on the questions submitted to them the jury were entitled to find as they have done—the effect of these findings is another matter. The fifth question put to the jury asked them was there at the time of the acts complained of a dispute between the plaintiff and the dock labourers, that is, the labourers, members of the Transport Union, and their answer was “no.” They were further asked, was it a dispute between the plaintiff and the Stevedores' Association into which the stevedores brought Larkin, Hopkins, and Redmond to assist, and the jury answered “yes.”

I think these are four proper questions, so far as they go, to leave to the jury. Was there evidence from which the jury could infer these conclusions? The plaintiff swears that his brother, the defendant, told him that, “unless I joined the Association, and charged the same rates, I would get no man to work with me, as they (the Association) had made an arrangement with Larkin not to allow the men to work,” and, on the 27th July, Newman, in presence of Long and Donohoe, said “I would get

no men to work for me, as Larkin had promised to assist them (the Stevedores' Association) in every way to get their (the stevedores') prices, and if I did not join he (Larkin) would withdraw the men from me." Daniel Lalor swore, "Neither I nor any of the men had any dispute with, but were ready to work for, O'Brien, L.C. the plaintiff." Kelly, a dock labourer, swore "it was the stevedores, not the workmen, were looking for the increase." Surely I should usurp the functions of the jury if I were to say they should not have believed this. It was their function to weigh it, and, if they believed it, to draw the inference they did. It is, to my mind, impossible to say that when they believed the statements of these witnesses they were necessarily wrong. Were the jury, in their findings, misled by anything the judge told them? The judge, in his report, says, "In reference to the answer No. 6, I pointed out to the jury that, as the answer to No. 5 was in the negative, question 6 did not arise; and a juror stated that the dispute negatived by answer 5 was a dispute with the dock labourers, and that they were of opinion that the dispute was with the Stevedores' Association." The judge says that this statement was made in the presence of the jury. I cannot, in the face of this report of the judge, hold that they were misled.

I come now to the answers to the third question. It appears that the jury first included only Larkin, Hopkins, and Redmond in their finding. One of the jury asked was there any evidence as regards the other three, and the Chief Baron told them that if there was an agreement amongst six, and three of them do acts in pursuance of the agreement, the acts are the acts of the six. The jury then retired, and included the other three. Much hostile criticism was directed to the action of the Chief Baron in this connexion; but, so far as I am concerned, as his direction in law was clearly right, I have only to see was there evidence on which they could legitimately include all six. I had at one time some doubt on this question; but, on carefully reading the report, I think they could draw the inference they did against all six. One of the objects of the Stevedores' Association, as plaintiff himself swears, was to prevent "under-cutting." The conversation of the 27th July, which took place at Ryan's publichouse, I have already referred to. I have also referred to Long's

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Appeal. (defendant's) statement that the Stevedores' Association had
 1913. made arrangements with Larkin not to allow the men to work.
LONG Newman and Donohoe were present at the first meeting at
v. Liberty Hall, when the whole question was discussed. It is
LARKIN. impossible then to say that the jury could not find that acts con-
O'Brien, L.C. templated by all the defendants were the prevention of labourers
 working for plaintiff if he did not join the Stevedores' Union.
 It still remains, could the jury legally draw the inference, so far as
 the defendants are concerned, that this prevention was to include
 the breaking of contracts. Stress has been laid upon the form of
 words used as being consistent only with a lawful interference,
 namely, by inducing the workmen not to enter into contracts;
 but the meaning of the language used is for the jury. The
 language is capable reasonably of the unlawful construction, and
 I think as the jury have formed their opinion I cannot interfere
 with it. I think also they were entitled to find that the inter-
 ference with the discharge of the "Sieben Jarl" was an act
 subsequent to the employment of the workmen engaged in the
 discharge, and inducing the men to break a contract entered upon.
 I conceive there was evidence from which they could draw the
 inferences they have, in answer to the third question.

There remains a difficulty with regard to questions 1 and 2,
 and how far they can be taken together with 3. 1 or 2, if taken
 alone, would not give a complete cause of action, nor, do I think,
 it was so intended. If I were satisfied that any miscarriage
 had taken place by reason of the form of the questions, I should
 of course give effect to that view; but, though much inclined
 in favour of the defendants at one time, I have come to the
 conclusion that they are not entitled to a new trial on this
 ground.

The three questions must be taken together, or at any rate
 1 and 3; and, although the illegal act was not set out in question 1,
 you cannot read 1 and 3 together, as you must, I think, read them,
 without holding as a matter of construction that, although 1 is
 not itself sufficient, 1 and 3 together are; and so read, "the force"
 in question 1 must be the illegal acts in question 3. Apart from
 the Trade Disputes Act, as answered 1 and 3 together appear to
 me to be sufficient to form a complete and sufficient finding.

No. 2 is not essential to plaintiff's case. But, again, it is for the jury, from given words such as were used in the present case, to infer that the words conveyed a threat, even though in form only warnings. It is the surrounding circumstances which enable the question to be determined, and I cannot say that the surrounding circumstances in the present case could not legally warrant the inferences drawn in the answer to No. 2. There remains, then, the question whether these findings, coupled with 5 and 6, exclude the possible operation of the Trade Disputes Act.

Once the jury have found—and in my judgment their findings cannot be disturbed—that the only dispute was one between the plaintiff and the stevedores, the Trade Disputes Act seems to me to be out of the case, and the important and interesting argument addressed to us on the construction of that Act will not arise. The jury have found that this was solely a dispute between employers and employers, and, although some suggestion was made to the contrary, I do not think that the stevedores are anything else except employers within the meaning of the statute. I can quite understand that many questions of great difficulty would have arisen if the jury had formed other views, which they legally might have done if the evidence had produced a different impression on their minds; but once the dispute becomes a dispute between employers and employers, and nothing more, the statute has no application.

As to the damages, the question of amount is not to be measured by the loss in connexion with the discharge of the "Sieben Jarl," taken on the basis of the profits on the contract between the plaintiffs and the shipowners. The matter of damages is altogether for the jury, and the same rules of law which prevent Courts interfering with findings of juries in matters properly within their domain, also prevent Courts from interfering with the amount of damages merely because the Court itself might have given less. The learned Chief Baron was satisfied with the finding; but as the measure is for the jury, I could not interfere merely because I might have given less; and, indeed, I do not think that in the conduct of the case the mere amount of damages was very seriously pressed, everything turning upon important questions of principle which were supposed to arise, but which, in the opinion I have formed, do not arise.

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As to the injunction, evidence of the acts subsequent to the writ may be considered as showing that the defendants contemplated a continuance of action rendering necessary such an order. I do not see any grounds for discharging it, having regard to the conclusion to which I have come on the main question.

HOLMES, L.J. :—

The plaintiff has been for many years carrying on the business of a stevedore. In the course of this business he enters into contracts with shipping agents for the discharge of cargoes in the port of Dublin, and to carry out such contracts he hires a class of workmen known as dock labourers. Many of these workmen are members of the Irish Transport Union, a society said to have been founded in 1904, of which the three first-named defendants were, when the action was brought, the secretary and delegates. The other defendants are members of the Dublin Stevedores' Association, founded in June or July of last year.

The cause of action appearing in the statement of claim is that in August, 1912, the defendants wrongfully and maliciously conspired and agreed to cause and induce, and did in fact cause and induce, the plaintiff's workmen to leave his employment, whereby the plaintiff sustained damage, and has been seriously injured in his business.

The defendants belonging to the Irish Transport Union delivered a defence admitting some and traversing other of the allegations in the statement of claim, and also relying on certain provisions of the Trade Disputes Act, 1906, as making the action unsustainable in law. The defence of the other three defendants was confined to traverses.

During the progress of the trial the plaintiff applied for liberty to amend his claim by adding a paragraph, and the Lord Chief Baron granted the application.

We have heard a great deal about the wily character of this amendment; but beyond alleging that the object of the wrongful agreement between the defendants was to force the plaintiff to join the Stevedores' Association, and stating more neatly and grammatically the acts done in furtherance thereof, the new

paragraph seems to me to make no real change in the cause of action, which might have proceeded on the pleading as it stood originally.

Little material conflict of fact is to be found in the evidence; and, except on one point, the law applicable thereto is fairly well settled. In these circumstances I propose (1) to state briefly the substance of the evidence; (2) then to examine whether such evidence is sufficient to justify the jury in answering the questions put to them as they have done; and (3) if so, to consider what ought to be the result of their answers.

Dealing in the first place with the evidence, I find that it starts with the circumstances that led to the creation of the Stevedores' Association. It appears that in June, 1912, the defendant Larkin was pressing the Dublin stevedores, of whom there were fourteen in all, to be more liberal in their dealings with the dock labourers employed by them. He states that his object was not so much to increase the wages of each individual employed, as that more workmen would be required for the discharge of a cargo. I gather from his evidence, which in this respect agrees with that of the plaintiff, that the workman's wages would not be increased, but that it would be necessary to employ more workmen. As far, however, as the stevedores were concerned, the important point was that their wages bill would become larger, and they naturally objected that, having regard to the rates of payment they received from the shipping agents, the result would be to leave them with little or no profit. In these circumstances Larkin, according to his own evidence, suggested that the stevedores ought to form an association for the purpose of obtaining by co-operative action higher rates from the shipping agents. This was the subject of discussion between Larkin and the stevedores at a meeting held in Liberty Hall, the headquarters of the Transport Union, on the 10th June, 1910.

The plaintiff and all the defendants, except William Long, were then present, and a list of prices in manuscript was produced, but no result was arrived at. The next meeting, according to the plaintiff's evidence, took place on the 18th June in Shaw Street, and if he is accurate, although Larkin may have been present, it was primarily a meeting of stevedores, with the defendant

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Newman in the chair. The list previously produced had been printed, and was examined. The plaintiff's evidence is, that finding that both the rate of wages and the terms of employment were the same as those then current in his business, he said, when the meeting was breaking up, that it did not affect him, and that he had no further interest in it. He adds that he was not present at any other meeting. None of the defendants speak of this meeting. Larkin and Hopkins depose to a meeting held on the 20th June at Liberty Hall, where the formation of the Stevedores' Association was discussed, and perhaps agreed to. These witnesses say that the plaintiff was present. I am disposed to think that there were two meetings, one on the 18th June, at Shaw Street, at which the plaintiff was present, but not Larkin; the other on the 20th June, at Liberty Hall, at which Larkin was present, but not the plaintiff. This is, however, immaterial.

There is no doubt that the Stevedores' Association was formed some time in July; that its object was to oblige if possible the shipowners to pay higher rates for the discharge of cargoes; and that Larkin was to use his influence to prevent dock labourers who were members of the Transport Union from working for stevedores who refused to join the association.

On a day which the plaintiff fixes as the 24th July, his brother, William Long, the defendant, saw him at Rush. The object of the visit evidently was to induce the plaintiff to become a member of the new body, and his brother admits that he told him that Larkin had promised that he would not allow any man to work for a stevedore who was not a recognized member of the association. There was another meeting between the brothers Long, Newman, and Donohoe on the 27th July, when Newman was the chief speaker, and said, according to the plaintiff's evidence, that Larkin had promised to assist them in every way to get their prices, and that, if the plaintiff did not join, Larkin would withdraw the men from him. The plaintiff further deposed that on the same evening the defendant Hopkins came to him and said Larkin wanted him; but although he went to Liberty Hall, he did not see Larkin. It has been suggested in argument that what was said on these occasions to the plaintiff was friendly advice, and that it would be for the advantage of the plaintiff, and

against the interest of the other members, if the plaintiff joined the association.

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This may be so from one point of view, but the jury would be entitled to draw a different inference—namely, that the anxiety of the members to induce the plaintiff to join them was lest he might carry out contracts at the old rates, and subject to the old regulations, by means of free labour, the effect of which would, or at least might be, to increase largely his business, to the loss of the stevedores who insisted on the new terms.

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The next important fact is, that on the 2nd August a vessel called the “Schoona” came into the port with a general cargo for the discharge of which the plaintiff contracted at a lesser rate than that of the association. He had no difficulty in obtaining men to work for him, but the defendant Hopkins met him on the quay and told him he had got orders from Larkin, who was then in London, to stop the discharge, presumably by inducing the workmen to break their contracts. He did not, however, do so on that occasion.

On the 7th August the “Sieben Jarl” arrived in the port in the evening, and the plaintiff was informed by the defendant Redmond that Larkin wanted to see him. The three thereupon met, and Larkin, according to the plaintiff’s evidence, told him in the plainest language that unless he joined the association and charged the same rates, he would withdraw the men. The witness added that Larkin said he had a meeting with the stevedores the day before, and had arranged to assist them in every way, and had promised them to withdraw plaintiff’s men unless the latter would charge the rates of the association. Next morning the plaintiff, having made a contract with the shipping agent to discharge the “Sieben Jarl,” employed for this purpose a gang of men. They began to work at 6 a.m. and continued till 7.15 a.m., when Hopkins and Redmond came down and ordered all the men off. Although by the custom of the port these dock labourers were bound to work for at least half a day, they stopped the discharge at once, Hopkins telling the plaintiff that he might make up his mind that he would be further stopped until he joined the association. It would have taken four days to discharge the vessel, but the gang that had been called away did not return,

Appeal. and the plaintiff was unable to get other hands to complete his
 1913. contract with the shipping agent. He thus lost the profit he
 LONG would have derived therefrom.

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LARKIN. On the 17th August Newman and William Long again spoke
 to the plaintiff, and the former told him that he might make
 up his mind that he would be further stopped. Accordingly, on
 the 22nd August the "Schoona" was again in port, and the plaintiff,
 having obtained the contract to discharge her, employed thirty-
 five men for the purpose. These men were proceeding towards
 the ship when Hopkins put up his hand and told them that they
 were not to work for the plaintiff. These men then went to
 Liberty Hall for their orders, with the result that he could not
 carry out his contract.

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He did not look again for employment until the 23rd September,
 when he tried to discharge the "Thelma," engaging forty men, who
 began to work, but they were called off almost at once by Hopkins.

The foregoing is the material evidence given by the
 plaintiff, and I cannot find it substantially contradicted; but
 even if it were, it was for the jury to consider its value. It
 is, however, strongly corroborated in every point by independent
 witnesses; and I may refer to one matter of great impor-
 tance. It will be noted that, according to the plaintiff's
 statement, so far from there being any hostility towards him on
 the part of the Transport Union, he had no difficulty in engaging
 men ready to work for him when he undertook to discharge a
 cargo, until Larkin, Hopkins, or Redmond interfered. Four
 members of the Transport Union were examined, and each of
 them testified in the most emphatic manner that the men were
 ready to work for the plaintiff, and that none of them had any
 dispute with him about wages or conditions of employment. It is
 clear from the evidence of these witnesses that the plaintiff's
 failure to carry out his contracts with the shipping agents was
 solely due to the influence brought to bear by Larkin, Hopkins,
 and Redmond on the dock labourers, which these workmen had
 not the courage to resist.

I now come to the questions left to the jury, and the answers
 thereto. The first four were as follows:—(1) Did the defendants,
 and if so which of them, agree to force the plaintiff to join the

Stevedores' Association? (2) Did the defendants, and if so which of them, in pursuance of the said agreement use threats to the plaintiff to force him to join the association? There then follows in the issue paper the names of all the defendants with a note of interrogation after each, the object being that the jury should write "yes" or "no" opposite each name. (3) Did the defendants, and if so which of them, in pursuance of the said agreement induce or procure dock labourers who had engaged to work for the plaintiff and were then actually working for him to break their contracts and leave the plaintiff's employment on the "Sieben Jarl" on the 8th August; "Schoona," 22nd August; "Thelma," 23rd September? (4) Did the said acts cause actual money loss to the plaintiff?

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To the first and fourth of these questions, the answer was a simple affirmative. To the second the word "yes" was written after each of the six names; and to the third there appeared as answer, when the issue paper was first handed down, the names Larkin, Hopkins, Redmond; whereupon the Lord Chief Baron pointed out to the jury that they had answered question 3 only, in relation to three of the defendants, and he sent them back (against Sergeant Sullivan's objection) to answer the question as regarded the other three defendants. One of the jury then asked, "Have we any evidence as regards those three?"—to which the judge replied, "If there was an agreement among six, and three of them do acts in pursuance of the agreement, the acts are the acts of the six." The jury then retired, and when they came back they had added the names of the other defendants.

Sergeant Sullivan has criticized severely the action of the judge in asking the jury to consider further their answer to question No. 3, and for some time I was under the impression that his objection was that what was done amounted to a direction to include all the defendants in their affirmative reply. The report of the Lord Chief Baron, however, shows that there was no such direction. He had a positive finding as to three of the defendants. He had none as to the other three; and I am of opinion that it was a matter of course for him to ask the jury, "What do you say as to them?" Thereupon, a juror who was in doubt as to whether there was evidence sufficient to entitle them

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 1913. to the judge, who replied in the words I have already quoted.
 LONG It cannot be denied that this was a legal and intelligible direction
 v. which presumably the jurors understood and acted on; and if
 LARKIN. there was evidence of such agreement and acts, the finding cannot
 Holmes, L.J. be questioned.

In addition to the findings of the jury already dealt with, they also found, in answer to further questions, that, at the time of the acts complained of, there was no dispute between the plaintiff and the dock labourers, but that there was a dispute between the plaintiff and the Stevedores' Association, into which the stevedores brought Larkin, Hopkins, and Redmond to assist. I understand that the Lord Chief Baron was of opinion that the foregoing finding amounted to a verdict for the plaintiff, and although some other questions (only one of which was answered) were contained in the issue paper, it was unnecessary for the jury to consider them. Accordingly, having ruled that the cause of action was not the conspiracy but the acts done in pursuance of it, and that therefore the plaintiff could only recover damages sustained up to the issuing of the writ of summons, he gave judgment for £200, the amount of damages up to that date assessed by the jury.

I have some difficulty in understanding the position taken by the defendants' counsel in relation to the answers given by the jury to the first four questions. They have not argued that there was no evidence to support the findings thereon. Their case appears to be that the questions were irrelevant, and ought therefore to be disregarded. I am strengthened in this opinion by finding from the judgment of Kenney, J., that counsel in the Divisional Court in his reply for the defendants confined his argument to the effect of the Trade Disputes Act, 1906, and admitted that in the absence of that Act his clients would have no case.

It must be borne in mind that the conspiracy or agreement relied on in the original and amended pleadings was not the agreement to form a Stevedores' Association. It is an agreement collateral thereto of the defendants Larkin, Hopkins, and Redmond, with the defendants Newman, Long, and Donohoe, that the former

would help the latter in carrying out the objects of the association by preventing the dock labourers from working for the plaintiff if he did not become a member of the association, and by causing workmen who contracted to work for him to break their contracts.

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As the law stood before the passing of the Trade Disputes Act, 1906, it was, I think, well settled that if certain individuals agreed together, for the purpose of forcing another to do some act which he was not bound and did not wish to do, to prevent his servants from working for him, or to induce them to leave his employment in violation of their contracts of service, and that in furtherance of such agreement they did induce such breaches of contract with the result that the person so treated sustained damage, an action at his suit would lie against them.

It is quite unnecessary to examine the authorities in support of this proposition: *Leathem v. Quinn* (1) goes at least as far as this, and probably much farther; but it is enough for the present case to say that if there is, as there clearly is, evidence to support the answers to the third and fourth questions, those answers would have entitled the plaintiff to a verdict, if the law has not been altered by statute since the judgment of the House of Lords in *Leathem v. Quinn* (1). I now come to the fifth and sixth findings. The questions to which they are a reply were suggested by the Act of 1906, the third section of which provides that "an act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment." Now an act cannot be done in furtherance of a trade dispute unless such a dispute exists; and therefore the Lord Chief Baron naturally asked the jury was there at the time of the acts complained of a dispute between the plaintiff and the dock labourers. The answer in the negative given thereto had, to support it, ample evidence to which I have already called attention. I gather from the judge's report that if question 5 was thus answered he did not intend the jury to go further; but, as a matter of fact, they said, in reply to No. 6, that it was a dispute between the plaintiff and

(1) [1901] A. C. 495.

Appeal. the Stevedores' Association, into which the stevedores brought
 1913. Larkin, Hopkins, and Redmond to assist. Such a dispute is
 LONG not a trade dispute as defined by sect. 5, sub-s. 3, of the Act of 1906,
 v. which enacts that the expression "trade dispute" means any
 LARKIN. dispute between employers and workmen, or between workmen
 Holmes, L.J. and workmen. It does not include a dispute between an employer
 and other employers, which is the only dispute found by the jury
 to exist in the present case. For these reasons I concur in affirm-
 ing the judgment appealed from ; but before I conclude I desire
 to refer to two matters to show that they have not been over-
 looked.

The damages assessed are largely in excess of the loss actually sustained ; but no objection has been taken thereto, for the obvious reason that for a wrong of this character, if there is some damage, the jury are not limited to giving the actual sum, but in assessing the amount may take into account the circumstances of the wrong.

The other matter is, that although the judge limited the assessment of damages to acts before the issue of the writ, he received evidence as to what occurred on the subsequent arrival of the "Schoona" and the "Thelma." In this I am of opinion that he was right. His doing so does not seem to have been objected to ; and as the evidence tended to show that what was done on the previous occasions was an intentional and deliberate wrong, I am of opinion that it was relevant to the issues which the jury were trying ; and, in any case, it was evidence material for the consideration of the judge in relation to the injunction claimed by the plaintiff.

CHERRY, L.J. :—

There is no substantial dispute as to the facts of this case ; and it is quite unnecessary for me, after the judgments which have been delivered in this Court and in the King's Bench Division, to review the evidence further than to say that there appears to me to be ample evidence to support all the findings of the jury on the questions of fact submitted to them ; and that an application to set aside the verdict on the ground that the findings, or any of them, are against the weight of evidence could not possibly be

sustained. I proceed, therefore, to consider the legal effect of those findings.

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Before doing so, however, it will be convenient that I should shortly summarize the grounds upon which, as I understand the arguments of the learned counsel for the defendants, the application to set aside the verdict and judgment in favour of the plaintiff is based. Their argument divides itself into four branches.

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In the first place, they say that there was no finding of malice by the jury, and no finding of any agreement either to do an unlawful act or to do a lawful act by unlawful means. Therefore they contend the case is not brought within the authority of the decision of the House of Lords in *Quinn v. Leathem* (1), and no action for conspiracy can be maintained.

In the next place, they say that there was no evidence of threats being here used by any of the defendants; that what are relied on by the plaintiffs as threats were in reality friendly warnings, and that the finding of the jury that threats were used was against evidence, and should be set aside.

Thirdly, they say that as regards the alleged acts of the defendants inducing or procuring the dock labourers to break their contracts with the plaintiff, there was a misdirection by the learned judge as regards, at all events, three of the defendants. Further, that the plaintiff suffered no damage by reason of this breach of contract, and that in any event the defendants are protected by the 3rd section of the Trade Disputes Act, 1906, 6 Edw. 7, c. 47, as such breach of contract was in furtherance of a "trade dispute" within the meaning of that Act.

Fourthly, they urge that inasmuch as the greater part of the seventh question left to the jury, and the eighth and ninth questions, were not answered, the defendants are entitled to a new trial of the action on this ground also.

I think that it is to be regretted that the first question was not left to the jury in the words of the amended statement of claim. That avers that "the defendants *wrongfully* and *maliciously* conspired and agreed amongst themselves *wrongfully* and *without legal authority* to force the plaintiff to join the Stevedores'

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Association," &c.; following in almost identical terms the words of the first question submitted to the jury in *Quinn v. Leathem* (1). I presume that the words "wrongfully and maliciously," and "wrongfully and without legal authority," were deliberately omitted from the question based upon the pleading. But if there be no finding of malice by the jury, as there is not, and no finding of anything wrongful or unlawful in the agreement alleged to have been entered into, as I do not think there is (unless it is implied in the words "to force"), I cannot see that the necessary elements of an actionable conspiracy are included in the first question submitted to the jury. The Attorney-General, for the plaintiff, admitted that this was so, but he said that if this finding was looked at in conjunction with the answers to the second and third questions dealing respectively with threats, and the acts of the defendants inducing the dock labourers to break their contracts, the necessary elements would be supplied. The difficulty, however, of this view is that the second and third questions deal with acts only, and not with an agreement to do the acts. Serjeant Sullivan and Mr. Ronan are, therefore, quite right in saying that there has been no finding of any *agreement* to use threats, or of any *agreement* to induce the breach of contracts, which are the only unlawful acts alleged, and, as I have already said, there is no finding of malice, or of any malicious motive. Under these circumstances, if the case was simply one of conspiracy, I do not think that it could be brought within the authority of *Quinn v. Leathem* (1), or that the judgment in favour of the plaintiff could be maintained.

But the case does not depend upon conspiracy alone. If wrongful acts are done by a number of persons acting in conjunction, each is liable for his own acts quite apart from any conspiracy to do them. The only object of introducing the element of conspiracy is to render each one liable for the acts of the others, which he clearly is, if the conspiracy is unlawful and the acts are done in furtherance of the common purpose. If, however, there is merely an agreement to do a lawful act by lawful means, and one of those who have entered into the agreement

(1) [1901] A. C., at p. 497.

does an unlawful act in furtherance of the common purpose, the others are not, as I understand the law, liable for his acts; but he is liable, not for conspiracy, but for the act itself apart from any question of conspiracy.

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Applying this principle to the present case, how does the matter stand? Let us assume in favour of the defendants that the agreement found to exist between the defendants is a perfectly lawful one, and that there is no unlawful element in it, still the jury have found, in answer to the 3rd question, that each and all of the defendants here—whether in pursuance of the agreement or not it does not matter—induced or procured the dock labourers who were engaged to work for the plaintiff, and were then actually working for him, to break their contracts. That is an actionable wrong if damage as a result is suffered by the plaintiff, quite apart from any question of conspiracy. The leading case on the subject is *Lumley v. Gye* (1), which has been followed in a number of cases since it was decided, and is distinctly recognized as good law by Lord Macnaghten in *Quinn v. Leathem* (2). “Speaking for myself,” he says (p. 510), “I have no hesitation in saying that I think the decision was right, not on the ground of malicious intention—that was not, I think, the gist of the action—but on the ground that a violation of legal right, committed knowingly, is a cause of action, and that it is a violation of legal right to interfere with contractual relations, recognized by law, if there be no sufficient justification for the interference.” This is a clear authority, in my opinion, for upholding the judgment in this case upon the answer to the 3rd question, without taking into account the answers to the 1st and 2nd questions at all.

Having arrived at this conclusion, it becomes immaterial to consider whether there was evidence sufficient to support the finding of the jury, on the second question submitted to them, that each of the defendants used threats towards the plaintiff, as, apart altogether from these threats, their finding on the third question is sufficient to support the judgment.

But, it is urged, the finding of the jury upon this third question was induced by a misdirection of the learned judge who tried

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1913. answered this question as to three only of the defendants, namely,
LONG the Transport Union men, and had left it unanswered as to the
v. other three, the stevedore men. The Lord Chief Baron drew
LARKIN. their attention to the omission to answer the question as to the
Cherry, L.J. latter, whereupon one of the jurors inquired, "Have we any
evidence as regards those three?" The Chief Baron answered,
"If there was an agreement amongst six, and three of them do
acts in pursuance of the agreement, the acts are the acts of the
six." This is the alleged misdirection. Now, this direction
is a little ambiguous. The same difficulty arises in regard to it
as exists in my mind in reference to the first question submitted
to the jury. If the agreement were a lawful one, and the acts
done by the three were unlawful, I do not, with every respect for
the view of the Lord Chief Baron, think that it would be correct;
but if it referred only to an agreement to do an unlawful act, or
a lawful act by unlawful means, I think that it would be correct.
Serjeant Sullivan argues, with great force, that when the Chief
Baron speaks of "an agreement" he must refer to the agreement
referred to in the first question. I do not think that this is so.
I think that the learned judge was speaking of an agreement in
the abstract, and that he meant to refer only to an unlawful
agreement. Probably the jury so understood him, and they went
back to their room, and answered the question in the affirmative
as regards the three stevedore defendants as well as the three
Transport Union men.

But, even if there was a misdirection, we ought not, under the
Judicature Rules (Order XXXIX, Rule 7), to order a new trial
unless we are satisfied that some substantial miscarriage of justice
was occasioned thereby; and, in this case, I am satisfied that there
has been no miscarriage of justice. I think that there is abundant
evidence to prove that, apart from all question of the responsibility
of the three stevedore defendants for the acts of the Transport
Union men, the stevedores, by their own acts, "procured" the
dock labourers to break their contracts with the plaintiff. They
did this certainly through Larkin and Hopkins, but that does not
make it any the less their act. The plaintiff's evidence is clear
upon this point, if believed, and the jury were entitled to believe

it, and had no reason, as far as I can see, for not believing it. Referring to the interview at Rush, he says:—"My brother [i.e., the defendant Long] told me that unless I joined the association, and charged the same rates, I would get no man to work for me, as they had made an arrangement with Larkin *not to allow* the men to work." Again, at the interview of the 27th of July, when the three stevedore defendants were all present, Newman, in the presence of the others, according to the plaintiff's story, said, "I would get no men to work for me, as Larkin had promised to assist them in every way to get their prices; and, if I did not join, *he would withdraw the men from me.*" When Hopkins came down, therefore, on the morning of the 8th of August, and ordered the men off the "Sieben Jarl," is it not clear that he was acting as agent for Newman, Long, and Donohoe, as well as for Larkin? They never repudiated his act; on the contrary, they threatened a repetition of it. When, on the 17th of August, plaintiff met Newman and said to him that it was a nice thing for him to get him stopped, Newman (in plaintiff's words) said "I might make up my mind that I would be further stopped." On this branch of the case the evidence is really much stronger and more direct against the three stevedore defendants than it is against either Larkin or Redmound, and any jury who found that these three defendants did not "procure" the dock labourers to break their contract would be finding, in my opinion, directly contrary to the evidence. Under these circumstances it is not necessary, in my opinion, to decide whether the direction of the Lord Chief Baron was or was not correct in point of law.

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That disposes of the entire case, except the question under the Trade Disputes Act, 1906; for there can be no doubt that the plaintiff suffered substantial pecuniary loss by the acts of the defendants. His whole business was stopped for weeks, if not months. No question has been raised on the new trial motion as to the amount of the damages, and the verdict, if it stands at all, must stand for the amount found by the jury.

If the Trade Disputes Act, 1906, applies in the present case, there is no doubt that the judgment cannot be sustained. The 1st section of that Act would be a complete answer to the conspiracy count, and the third section to the cause of action founded

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upon the inducement to the dock labourers to break their contracts. But both sections apply only to acts done "in contemplation or furtherance of a trade dispute." A "trade dispute" is defined by the 5th section of the Act to be "any dispute between employers and workmen or between workmen and workmen" which is connected with certain matters not necessary now to specify. The jury have found in answer to the fifth and sixth questions that there was no dispute between the plaintiff and the dock labourers, but that there was a dispute between the plaintiff and the Stevedores' Association into which the stevedores brought Larkin, Hopkins, and Redmond to assist. The question is, therefore, was this a "trade dispute." It can only be so regarded if the stevedores are to be classed as "workmen." It is argued that they are, owing to the very wide definition of "workmen" contained in the same section, namely, "all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises." I agree with Gibson, J., that the generality of this definition must be in some way restricted. Taken literally it would include employers as well as workmen, for they are in one sense "employed in trade or industry," but I think the word "employed" must mean "hired under a contract of service," which stevedores clearly are not. As between the two classes—employers and employed—stevedores naturally belong to the former rather than to the latter class. They contract with the shipowners for the discharge of cargo, and themselves hire the labourers who actually do the work. How can it be said therefore that they are workmen? and if they are not "workmen," there is, on the finding of the jury, no trade dispute here, for a "trade dispute" in the technical sense of the Act cannot exist unless workmen are in some way involved in it. I therefore come to the conclusion that the Trade Disputes Act, 1906, has no application to this action.

Having answered the two questions as to the nature of the dispute, it was unnecessary, in my opinion, for the jury to answer the 7th, 8th, or 9th question left to them; and I do not think that the Lord Chief Baron intended them to be answered unless the jury answered the 5th question in the affirmative, which they did not do. The words "if so" at the commencement of the 6th

question are, I think, accidentally transferred. They ought to appear in the 7th question, which was probably originally intended to follow the 5th question immediately. I arrive at that conclusion from an inspection of the original issue paper.

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On the whole, therefore, I agree with the other members of the Court that the Trade Disputes Act does not apply to the case; that the answers of the jury to the questions submitted to them are sufficient, and entitle the plaintiff to judgment; that these answers are not against the weight of evidence; and that, therefore, the order of the Court below should be affirmed with costs.

Solicitor for plaintiff: *M. Good.*

Solicitors for defendants Larkin, Hopkins, and Redmond :
William Smyth & Son.

Solicitors for defendants Long, Newman, and Donohoe :
T. Gerrard & Co.

J. M.

IN RE JOHN OLIVER, A BANKRUPT (1).

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June 9, 10.

Bankruptcy—Principal and agent—Payment by cheque on eve of bankruptcy—Cheque given in substitution for former uncashed cheque—Dominant motive for payment—Fraudulent preference—Onus of proof—Bankruptcy (Ireland) Amendment Act, 1872 (35 & 36 Vict. c. 58), s. 53.

O. acted as agent for W. in the selling of cattle. On January 30th, O. sent to W. in England a cheque for the proceeds of certain sales, which cheque W. omitted to cash, and he came to Ireland leaving the uncashed cheque in England. On the 4th February, W. met O., who informed him of his insolvency, and, at W.'s request, O. gave him a cheque for the same amount and bearing the same date as the former, and in substitution therefor. This cheque W. immediately cashed. Earlier that day O. had instructed his solicitor to file a petition in arrangement on his behalf, and the petition was filed later in the same day and protection granted.

Held, by the Court of Appeal (reversing the decision of Boyd, J.), that the giving of the second cheque did not amount to a fraudulent preference of W. under sect. 53 of the Bankruptcy (Ireland) Amendment Act, 1872.

This was an appeal by Robert Whittaker from an order of Boyd, J., made in this matter on the 15th May, 1914, whereby it was declared that a payment of £518 11s. made by the bankrupt, John Oliver, to the said Robert Whittaker was fraudulent and void within the meaning of the 53rd section of the Bankruptcy (Ireland) Amendment Act, 1872, and it was ordered that the said Robert Whittaker should forthwith pay the said sum to the assignees. The payment of the money was made under the following circumstances:—

Oliver had since 1911 been carrying on business as a cattle dealer, and in September, 1913, he entered into an arrangement with Whittaker to act as his agent in the sale of cattle. Under this arrangement Whittaker purchased cattle in the Dublin markets from week to week, the cattle being entrusted to Oliver, who brought them to Birkenhead, and there sold them. Oliver then sent to Whittaker cheques for the proceeds of the sales drawn

(1) Before O'BRIEN, L.C., CHERRY, L.C.J., and HOLMES, L.J.

on the Smithfield Branch of the Royal Bank of Ireland, and was paid by Whittaker a commission of 5s. per head in respect of the cattle sold. This method of doing business continued between Oliver and Whittaker to the end of January, 1914, and on Saturday, the 30th January, 1914, Oliver sent to Whittaker at his address in Salford a cheque, dated January 31st, for £518 11s. drawn on the said bank, to cover the proceeds of sales of twenty-three head of cattle which Oliver had sold for Whittaker during the week ending 31st January, 1914. This cheque Whittaker omitted to lodge, and he left Salford for Dublin on the following Tuesday, the 3rd February, to attend the Dublin markets, leaving the cheque behind him at Salford. At nine o'clock on the morning of Wednesday, the 4th February, Oliver went to Whittaker's hotel, and had an interview with him, in the course of which Oliver informed Whittaker that he had bad news for him; that "the bank had stopped him," but that he was getting a good situation in South America, and would then pay for twenty-seven head of cattle which he (Oliver) had sold for Whittaker the day before, and the price of which, £578 11s., Whittaker subsequently claimed for in this matter as an unsecured creditor. According to Whittaker no reference was made on this occasion to the cheque of the 31st January. On leaving Whittaker at about 10.30 Oliver went to his solicitors and instructed them to file a petition for arrangement, and the petition was filed at 3.30 o'clock on the same afternoon and protection granted. About 1 o'clock on the same day Whittaker met Oliver in the street and took him to his hotel. Whittaker then asked Oliver if he had money in the bank to meet the cheque of the 31st January, because he had not lodged it and had not got it with him, to which Oliver replied that "your money is in the bank all right." Whittaker then said that Oliver must give him another cheque, and Oliver then wrote out a cheque, a duplicate of that of the 31st January, and bearing that date. This cheque Whittaker immediately took to the bank, and he received cash for it across the counter. Oliver was at this time insolvent; he owed to three creditors £1971 1s. 4d. for cattle which he had got on credit on the 29th January, 1914, and his entire assets as disclosed in his statement of affairs amounted to £243, while his liabilities were returned at £4201 13s. 1d.

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Blood, K.C. (with him *Ronan, K.C.*, and *Hayes*), for the appellant :—

The giving of the second cheque did not amount to an undue preference of Whittaker, and the assignees have failed to discharge the onus of proof which lies on them, namely, to establish not only that what took place had the effect of giving a preference, but that the dominant idea or intent of Oliver was to prefer : *In re Goldsmid, Ex parte Taylor* (1); *In re Lake, Ex parte Dyer* (2). It is clear that the second cheque was merely a substitute for the first, and was given for the purpose of rendering the conditional payment, made by giving the first cheque, an effective payment. *In re Tweedale, Ex parte Tweedale* (3) rules the present case. There the impeached security was given in substitution for a security which was in fact void ; here the giving of the first cheque was a perfectly valid transaction. If that cheque had been presented and cashed on the 4th February, clearly the assignees could not have intervened. The money received by Whittaker was his own money. Oliver's duty as agent was to keep it apart from his own. He was in the position of a constructive trustee of the money for his principal, and it is well settled that a payment made by an insolvent trustee with the view of repairing a breach of trust is not a fraudulent preference : see *Sharp v. Jackson* (4). [*Ex parte Lancaster, In re Marsden* (5) and *Currie v. Misa* (6) were also referred to.]

Herbert Wilson, K.C., and *W. E. Wylie*, for the assignees :—

The giving of the second cheque was an undue preference of Whittaker. We admit that if the first cheque had been cashed the assignees could not have complained. But when the second cheque was given the circumstances had changed ; this was a new transaction ; both parties knew that Oliver was insolvent and was seeking protection that day. They knew that the first cheque could not be made effective, and accordingly, with the view of giving Whittaker a preference over the other creditors, the second

(1) 18 Q. B. D. 295.

(2) [1901] 1 Q. B. 710.

(3) [1892] 2 Q. B. 216.

(4) [1899] A. C. 419.

(5) 25 Ch. D. 311.

(6) L. R. 10 Ex. 153.

cheque was signed. If the real motive was to keep faith with Whittaker, it was a motive "to keep faith with him by preferring him": see judgment of Porter, M.R., in *In re Daly & Co.* (1). Once the assignees have established that Oliver was insolvent when he made the payment, and knew that he was insolvent, the onus of proof is shifted, and it is for the appellant to show that the payment was not made with a view to prefer him: see *In re Eaton & Co., Ex parte Viney* (2).

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Blood, in reply.

O'BRIEN, L.C.:—

This case comes before the court on appeal from an order made by Mr. Justice Boyd, sitting as judge of the Court of Bankruptcy, by which he declared that the payment of a sum of £518 11s., made by the bankrupt to one Robert Whittaker, was fraudulent and void within the meaning of sect. 53 of the Bankruptcy (Ireland) Act, 1872. The learned judge delivered no judgment, and I have accordingly to refer very briefly to the evidence in the case.

The bankrupt was a cattle dealer, and for some time prior to the bankruptcy he transacted business with Whittaker in the following way:—Whittaker, who was also in the cattle trade, used to make purchases of cattle in the Dublin cattle market, usually on Thursday. Having bought and paid for them, he entrusted them to the bankrupt for sale in Birkenhead. They were usually sold by the bankrupt on the following Friday or Saturday, and he was bound to forward the proceeds of sale to Whittaker, less by a commission of 5s. per head of cattle.

The bankrupt, during the week ending the 31st January, 1914, having sold cattle belonging to Whittaker in this way, forwarded to Whittaker on Friday, the 30th, a cheque post-dated Saturday, the 31st January, drawn on a branch of the Royal Bank of Ireland in Dublin in favour of Whittaker for a sum of £518 11s. Whittaker received the cheque in Salford (Manchester), where he resides or carries on business. This was the usual method of

(1) 19 L. R. Ir. 83, at p. 93.

(2) [1897] 2 Q. B. 16, at p. 17.

Appeal. dealing between the parties; and Oliver was not in the habit of
— 1914. — in any way “earmarking” the moneys which he received as
In re Whittaker’s, but mixed them up with his own, either by lodgment
OLIVER. in a bank in Birkenhead, where he had an account, or in Dublin.
O’Brien, L.C. It did not appear that all moneys so received were lodged. Some
of them may have been directly applied in discharge of liabilities
of Oliver. It is important to note that Whittaker was the only
man with whom the bankrupt had dealings on these terms. His
other creditors were creditors for the price of cattle purchased by
by him from them in the ordinary course of his business as a
cattle dealer. It is manifest that Whittaker must have been
quite satisfied of the bankrupt’s solvency. He did not lodge the
cheque immediately for collection, and when he came to Dublin
on Tuesday, the 3rd February, to attend the cattle market, he
left the cheque behind at Salford. No question whatsoever arises
as to the validity of this conditional payment by cheque; and it
was also admitted, nor could it be denied, that if Whittaker had
brought the cheque to Dublin to cash it, the payment would have
been perfectly regular. It was also admitted that, under these
circumstances, knowledge acquired in Dublin of the then insolvent
state of Oliver would not have invalidated the payment. The
grounds of attacking the transaction depend upon the following
facts:—

It is stated by Whittaker, who was not cross-examined, and
whose account does not seem to me to be untruthful, that, on the
morning of the 4th February, the bankrupt and his brother,
James Oliver, came to see him at the Hammam Hotel. It appears
that in addition to the cattle the proceeds of sale whereof were
represented by the cheque I have mentioned, Oliver had sold, on
the 3rd February, another lot of twenty-seven head of cattle in
respect of which £578 11s. would have been payable to Whittaker,
and for which he is now claiming as an ordinary unsecured creditor.
The existence of this debt to some extent, I consider, affects the
question of fact on the issue before us. At that interview there
was a conversation about this second lot of cattle. It was sug-
gested that there was also a conversation at that interview as to
the first transaction, represented by the cheque; but it does not
seem to me to be material whether the cheque was then mentioned

or not. The bankrupt, Whittaker says, told him that he was sorry to say that he had bad news, that the bank had "stopped him," but that a man in Birkenhead had told him to come and settle with the man he owed the money to, and then he would get him (the bankrupt) a situation in South America, at a good salary, and that he (the bankrupt) could then pay for the twenty-seven head of cattle, that is to say, the second lot. Whittaker appears to have been very angry, and it is not to be wondered at, when he heard this. Later in the day Whittaker says that it occurred to him that the bankrupt would withdraw any cash to his credit at the bank; that he had remembered the unlodged cheque for £518 11s.; and that he met the bankrupt, and brought him to the Hammam Hotel, and asked him if he had money in bank to meet this cheque. The bankrupt asked him why. Whittaker said, "Because I have not lodged it, and have not brought it with me." The bankrupt said, "Your money is in the bank all right"; and Whittaker then said, "You must give me another cheque"; and the bankrupt then wrote a duplicate cheque, bearing the same date as the old cheque. Whittaker at once went to the bank, and cashed this second cheque. The bankrupt's account does not differ materially, because, whatever its effect, one must draw the inference that when Whittaker got this second cheque he was aware that the bankrupt was insolvent, and much stress has been laid on this.

There is an important statement, made by the bankrupt on cross-examination by the assignees (his deposition, by consent, being used in the present proceedings). He says that when he saw Mr. Whittaker in the morning he told him that Reeves (that is the Birkenhead bankers) would not advance him money unless he had stock in Birkenhead, and he had none; that when Whittaker told him he had not presented the cheque, and that he had left it in Manchester, the bankrupt said, "That is terrible, as I owe you over £500; you had better have a duplicate cheque." This reference to £500 is manifestly not the money covered by the cheque, but the money, in respect of which no cheque was given, for the proceeds of sale of the second lot of cattle.

These are all the material facts, and the assignees contend that the court must draw the inference which Mr. Justice Boyd did,

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that the giving of the second cheque, with its subsequent payment, having regard to the known insolvency of Oliver at the date when it was presented and paid, amounted to a fraudulent preference.

In approaching questions of fraudulent preference, it must be borne in mind that the onus of proof is on the assignees; and although it was urged that mere knowledge by the creditor of insolvency is sufficient to shift this onus, in my opinion this is not the state of the law. It is true that a statement to this effect was made by the learned judge in the case of *Ex parte Viney* (1), and also in the case of *Ex parte Dyer* (2), but this was dissented from in *Ex parte Green* (3), and is clearly inconsistent with the judgment of Lord Justice Cotton in *Ex parte Lancaster* (4). Knowledge of facts amounting to an act of bankruptcy would have a different effect, but mere knowledge of insolvency, which is all that I can see in the present case, would not.

In very many cases the facts are so clearly established that it is quite unnecessary to advert to this question of onus, but in others, of which I conceive this to be one, the rule of law must not be lost sight of, and this is even more to be remembered in Ireland where a payee in good faith and for valuable consideration has a greater protection than in England, and see *Butcher v. Stead* (5).

Have the assignees sustained the onus of proof which lies on them? I think not. Without reference to authorities, it is sufficient to say that it must be established that the dominant motive of the debtor was to "prefer"; this dominant motive is one to be inferred or rejected by the court on an examination of the evidence, and, as I have indicated, there is no presumption against the creditor, the onus not being on him.

Although this question of intention is one of fact, certain principles are well established which must be taken into account in determining it. One of those principles was laid down over 120 years ago in *Thompson v. Freeman* (6), and approved and adopted by the House of Lords in 1899 in *Sharp v. Jackson* (7). In *Thompson v. Freeman* (6), the bankrupt on the 3rd June, 1785, being indebted

(1) [1897] 2 Q. B. 16.

(2) [1901] 1 Q. B. 710.

(3) 5 Mans. 48.

(4) 25 Ch. D. 311.

(5) L. R. 7 H. L. at p. 846.

(6) 1 T. R. 155.

(7) [1899] A. C. 419.

to the defendant, sent for him and proposed to him that he, the defendant, should "take out his debts in goods," to which he acceded, and a warrant of attorney, which was subsequently impeached by the assignees as a fraudulent preference, was given. In the language of Lord Halsbury, referring to the case in *Sharp v. Jackson* (1) "there was no threat and no application for payment of the debt coupled with anything which involved legal procedure or anything of the sort, but, as a matter of fact, the bankrupt, in her own mind, from a mistaken sense of what was going to be done, thought that legal proceedings were going to be taken; and the assumption of the Court is that it was that mistake that induced her to do the thing. Lord Mansfield says: 'A bankrupt, when in contemplation of his bankruptcy, cannot by any voluntary act favour any one creditor; but if, under fear of legal process, he gives a preference, it is evidence that he does not do it voluntarily.' And though the defendant in this case had taken no steps to secure himself, in case he was called upon, yet the bankrupt, acting from mistake, was under the same apprehensions of legal process as if the defendant had actually *threatened* her; so that her executing the warrant of attorney was not a voluntary act, but the effect of fear, however groundless that might be."

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Now, while the effect of pressure is not denied by the assignees, it is said that when the substituted cheque was given Whittaker was a creditor, and that Oliver may have had at most a sense of moral obligation, but that a mere sense of moral obligation will not prevent the Court drawing the conclusion that there was such an intention to prefer that no principle of law or sense can enable the Court to avoid giving effect to the section of the Act of Parliament.

There are three cases, one of which was cited at the Bar, *Buckley's Case* (2), following *Ex parte Suffolk* (3), and *In re Vingoe* (4), in which this principle was applied; but an examination of them satisfies me that none of them has any real application to the present.

(1) [1899] A. C. 419, at p. 425.

(2) [1899] 2 Ch. 725.

(3) 9 Mor. 8.

(4) 1 Mans. 416.

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In none of them could it, I think, seriously be suggested that the bankrupt had any idea except that he was doing an honourable thing knowing and believing there was no legal liability.

My opinion, from the evidence of the bankrupt and Whittaker, is, that the bankrupt did believe that, in respect of the transaction for which he had given the cheque, Whittaker was legally in quite a different position from the other creditors, and that the debt was in a different legal position from the other debt which he owed to Whittaker. I believe that he told Whittaker that his (Whittaker's) money was in the bank, and that when Whittaker insisted, as I think he did, that he should get another cheque, he and the bankrupt believed that the latter was legally bound to give it. Once knowledge of insolvency ceases to be a governing factor, I draw the inference that the governing motive in the bankrupt's mind when he gave the duplicate cheque was that he was fulfilling not only a moral but a legal obligation, and it is not material that his view of the law was incorrect.

A case was cited on behalf of the appellants, which is in point, *Ex parte Tweedale* (1). It does not lay down any principle of law, but it shows the extent to which courts go, and rightly go, in upholding a transaction as not being a fraudulent preference where the transaction, so far as the creditor is concerned, is morally fair and honest. And it must not be forgotten that Vaughan Williams, J., was the judge who had expressed the strongest view in regard to the question of onus in *Ex parte Viney* (2).

In that case of *Ex parte Tweedale* (1) a bill of sale of furniture was given to a bankrupt's wife by the bankrupt, but as it was in law void, a second bill of sale was given to correct the error in the first, the debtor believing himself to be legally bound to give new security, while in fact he was not. The Court of Appeal held that the giving of the second bill of sale to correct the blunder in the first was not to be considered as a fraudulent preference. If, instead of giving the second bill of sale, the debtor, still believing that he was bound to pay, had made actual payment, the position of affairs would appear to be the same. *Ex parte Viney* (2), which,

(1) [1892] 2 Q. B. 216.

(2) [1897] 2 Q. B. 16.

as I said, cannot be considered an authority for one of the propositions put forward, was strongly pressed by the respondent. I think the learned judge may have been somewhat influenced by the strong view he had with regard to the question of onus of proof, but, be that as it may, whatever may be the right inference to have drawn from the peculiar facts in that case, they were as different as they well could be from the facts in the present. I think the proper and reasonable inference to be drawn in the present case is that the dominant intention was not to prefer, not in other words to commit a fraud, but that the intention was to make effective an honest conditional payment under a belief of legal liability.

In the course of the argument it was admitted, not only that if the cheque had been brought over and lodged with knowledge of insolvency it would be good, but that even if the debtor had kept back the presentation of his petition so as to enable the first cheque to be lodged, the transaction would be good. I cannot see that there is any essential difference between this and what was actually done. If payment, on that morning, of the original cheque would, as it is admitted, have been perfectly good, I fail to see why there should be inferred an intention to give a preference fraudulent in law by substituting another cheque for that which was honestly given. We were much pressed by the view that this was not a transaction in ordinary course, and therefore must be void. I cannot appreciate in the present case the force of this view, and in this connexion I would refer to the case of *Crosby v. Crouch* (1), an old case, but one still of authority. There, goods were deposited to secure bills which had not matured, at the importunity of the creditor, who actually knew that the bankrupt had compounded two or three years before, and yet it was held a good transaction by Lord Ellenborough. In that case, speaking of the technical rule of fraudulent preference, the Lord Chancellor said, "The cases upon the subject have gone far and far enough, and I am not disposed to give them any extension."

I think there is sometimes a tendency to forget this very wise rule in administering the section of the Act.

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CHERRY, L.C.J. :—

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The important fact to bear in mind in considering this appeal is that the first cheque for £518 11s. given by the bankrupt to Mr. Whittaker was given in the ordinary course of business, and was a perfectly honest and bona fide payment. That cheque was dated the 31st January, 1914, and was actually sent by post on the day before to Mr. Whittaker in Salford. Had that cheque been presented for payment at any time prior to the presentation of the petition, it would have been paid; and Mr. Wilson, for the assignees, expressly admits that he could not have contended that such payment would have amounted to a fraudulent preference within the meaning of the 53rd section of the Bankruptcy Act, 1872.

In my opinion the sending of this first cheque was the substantial part of the transaction, and really constituted the payment which is impeached. The second cheque, drawn on the 4th of February following, was, in fact, only a substitute for the first cheque. If Mr. Whittaker had had the first cheque in his pocket at the time of the interview with the bankrupt on the 4th of February, and if he had, on hearing of the bankrupt's financial condition, immediately gone to the bank and presented the cheque, it would have been paid, and the assignees could not have questioned the payment. The mere fact that he had left the cheque behind him in Salford ought not, I think, to prejudice his position. He asked for, or was offered (it does not matter which), a *duplicate* of that cheque. The cheque given to him is an actual duplicate. It is of the same date, and is indistinguishable from the first cheque except by its number. The giving of this cheque cannot be regarded, as the order appealed from treats the matter, as a fresh payment. The case is substantially the same as if the first cheque had been lost or defaced, and the payee had simply asked for a duplicate of it. It could not, in that event, have been contended that the giving of the duplicate cheque was a separate payment, or that it was a fraudulent preference within the meaning of the section, unless the original transaction was in itself in violation of the section. I do not think that in the present case a similar contention can be sustained.

The case of *In re Tweedale* (1) is a strong authority for the appellant. In fact it goes a great deal further than we are asked to go in this case. There, a husband had shortly before his bankruptcy executed a bill of sale by which he assigned his furniture to his wife to secure advances bona fide made by her. It turned out that the bill of sale was void because it included after-acquired property. He then, two days after he had summoned a meeting of his creditors, and a fortnight before a receiving order was made, executed a new bill of sale of the same furniture in substitution for the void bill of sale previously executed. The Court of Appeal unanimously held that the substitution of the valid bill of sale for one which was void did not amount in law to an intention by the bankrupt to prefer his wife to his other creditors, but that it actually negatived the existence of any such intention.

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Surely, if the substitution of a valid for an invalid security does not amount to a fraudulent preference, the substitution of a duplicate cheque for one which is not for the moment available for presentation cannot be held to be such.

For these reasons I am of opinion that the order of the Court below should be reversed.

HOLMES, L.J. :—

This appeal is taken from an order of Boyd, J., by which he declared that a payment of £518 11s. made by John Oliver, the bankrupt, to Robert Whittaker, was fraudulent and void within the meaning of the 53rd section of the Bankruptcy (Ireland) Amendment Act, 1872, and that Robert Whittaker should forthwith pay to the assignees the said sum. Before referring to the legislation which is relied on in support of this order, I propose to state the facts of the case. Both the bankrupt and the appellant seem to me to have given their evidence with a desire to be honest and truthful; and, although there are some trifling differences in what was deposed to by them, the variations in their story do not materially affect the question for decision.

(1) [1892] 2 Q. B. 216.

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Oliver, the bankrupt, was engaged in the cattle trade from some time in the year 1911 down to February, 1914, buying and selling cattle at fairs and markets in the usual way. In September, 1913, he arranged with Mr. Whittaker, of Salford, that the latter would occasionally purchase two or three wagons of cattle, and employ Oliver to sell them for him at Birkenhead in consideration of a commission of 5s. an animal; and, pursuant to this arrangement, Whittaker bought and paid for cattle almost once a week (usually on Thursday), and handed them over to Oliver to be sold by him. The price of these cattle, less the commission, was, on Friday or Saturday, sent by Oliver to his principal by cheque on the Smithfield branch of the Royal Bank of Ireland, and, on the 31st January, 1914, a cheque of this kind for £518 11s. was forwarded to Whittaker in Salford. That this cheque was sent and received in the ordinary way of business is admitted by counsel for the assignees; and, if it had been lodged in the Dublin bank on Monday, Tuesday, or Wednesday, it would have been duly honoured, nor would it have been possible to question the transaction.

Whittaker seems to have had no suspicion of the solvency of his agent; and he not only did not lodge the cheque at once, but when he crossed to Ireland on Tuesday night to attend a fair, he did not bring it with him. Oliver, however, was never thoroughly solvent, and, at the beginning of this week, his affairs were in a critical condition. His account had been overdrawn on the Saturday; but, as he intended to make a large lodgment on Monday morning, there would have been ample funds to meet the cheque. There were, however, other demands coming in immediately, and, on Monday, Reeves' Bank in Birkenhead, which had been in the habit of making advances to him, declined to do so without security he could not give. In these circumstances he came to the conclusion that he would be obliged to stop payment; and he and a brother came early on Wednesday morning to see Whittaker, while he was still in bed in his hotel. This is commented on as suspicious. It is said that the brother is a servant of Whittaker, and was intended to induce him to take some step. This was a mistake, as he had no connexion as a servant or otherwise with Whittaker; and, even if he had, I cannot guess what he could have done.

I am satisfied that the visit of the Olivers had nothing whatever to do with the cheque of the preceding Saturday. They believed that it had been duly cashed; but, unfortunately, the bankrupt had sold cattle belonging to Whittaker of the value of over £570 on the Monday or Tuesday, and had let the money disappear amongst his own creditors. In the circumstances the transaction looked an ugly one, and Oliver might have had grave doubts as to whether such conduct by an agent might not be criminal. His evidence as to what occurred at this interview differs somewhat from that of his principal; but I am of opinion that the latter is more accurate. According to Whittaker's account the talk was about the £578 for the cattle last sold and an absurd suggestion by Oliver of a mode of paying it. Nothing, however, was said about a preference over the other creditors as to it. Oliver then went to his solicitors, and Whittaker in the course of the day, remembering the other cheque which he had at first forgotten, went to Oliver and asked him if he had money to meet it. The bankrupt asked why, and Whittaker answered that he had not lodged it, and had not it with him. Oliver then said, "Your money is in the bank all right"; and in reply to a request for a duplicate cheque, he wrote another of the same date and for the same amount as that of the 31st January, which Whittaker cashed immediately. This is the sum which by the order appealed from is directed to be paid to the assignees; and having stated the facts in so far as I regard them as material, I shall consider what is their legal consequence.

This turns upon the 53rd sect. of the Bankruptcy (Ireland) Amendment Act, 1872. It relates to different kinds of obligations and property; but, confining myself to what we are now dealing with, it enacts that "every payment made, and every obligation incurred . . . by any person unable to pay his debts as they become due from his own moneys in favour of any creditor . . . with a view of giving such creditor a preference over the other creditors, shall, if the person . . . paying . . . the same become bankrupt within three months after the date of . . . paying . . . the same, be deemed fraudulent and void as against the assignees . . . of such bankrupt . . . but this section shall not affect the rights of a . . . payee . . . in good faith and for valuable consideration." This

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section is identical with sect. 92 of the English Act of 1869 (32 & 33 Vict.), the place of which was afterwards taken by sect. 48 of the Bankruptcy Act, 1883, similar in its terms, except that the final saving clause is omitted.

These enactments have been discussed in many cases, the decisions in which are far from uniform. It would be a labour—not of love—to criticize them, and impossible to harmonize them. There is, however, one principle which I think is now settled. I shall state it in the words of a judge of great experience in this branch of law. There is a “qualification or condition which is the very life and essence of the enactment: the payment must, in order to be void, be made ‘in favour of any creditor with a view of giving such creditor a preference over the other creditors.’ So that unless it can be made clearly apparent, and to the satisfaction of the Court which has to decide, that the debtor’s sole motive was to prefer the creditor paid to the other creditors, the payment cannot be impeached, even though it be obviously in favour of a creditor. The act of the debtor is alone to be considered—the object and purpose for which the payment is made can alone be inquired into—and although it is perfectly legitimate, and in all cases requisite, that all the attending circumstances should be carefully investigated, yet if the act done can be properly referred to some other motive or reason than that of giving the creditor paid a preference over the other creditors, then I conceive neither the statute, nor any principle of law or policy, will justify a Court of law in holding that the payment is fraudulent or void.” These are the words of Bacon, V.-C., in *Ex parte Blackburn* (1), and I agree with them. It is not, and cannot be, denied that the cheque of the 31st January was a similar business transaction to the cheque sent or given on almost every Saturday since the previous September. It was to pay money belonging to the payee which had come into his agent’s hands during the previous week. I gather from Oliver’s evidence he was giving other cheques and making other payments in the ordinary way of business during the same week, and the Monday and Tuesday following. Is it said that these payments were with a view of

(1) L. R. 12 Eq. 358, at p. 364

giving certain creditors a preference over certain other creditors? I think not; and there is no greater evidence to show that the cheque sent on Saturday was sent with this view.

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It is, however, unnecessary for me to labour this branch of the case, as it is conceded in the fullest way by counsel for the respondent, who also admit that if Whittaker had the cheque with him on Wednesday he could have had it cashed immediately after Oliver had told him of his inability to pay his creditors. Given as it was in the ordinary course of business, and received in perfect good faith, it could have been lawfully paid if there was cash to meet it any time before an act of bankruptcy. The result is that the order rests entirely on the giving of the duplicate cheque. I am quite unable to attach any importance to this. If the first cheque was not given with a view of giving Whittaker a preference over other creditors, I am quite unable to attribute such a view to the giving of the second. It was the same money that was applied to the payment of the second which would have been applied to the payment of the first if it had been presented in ordinary course. Such payment would not, in the case of its being the first, be with a view to preference. Why should it be in the case of the second? In judgments in cases of this kind, I have known judges express regret if persons receiving in good faith payment of their just demands should be obliged to repay the sum received on account of the mental attitude of the person paying; but it would seem to me to reduce this branch of law to an absurdity if it were held that the question depended upon whether a bank made the payment in discharge of one or other of two documents, one being a duplicate of the other. For those reasons I am of opinion that the appeal must be allowed.

Solicitors for the appellant: *Hayes & Sons.*

Solicitors for the assignees: *J. L. Scallan & Co.*

R. ST. J. C.

HUNTER AND CO v. COLEMAN (1).

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May 4, 5, 6, *Customs—Prohibition of importation of arms into Ireland—Proclamation—*
7, 8. *Seizure—Forfeiture—Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36),*
June 15. *s. 43.*

Sect. 43 of the Customs Consolidation Act, 1876, provides that "The importation of arms, ammunition, gunpowder, or any other goods may be prohibited by proclamation or order in council."

Held (by Cherry, L.C.J., and Dodd, J., Kenny, J., *diss.*) that in a proclamation under the section the area into which importation is prohibited may be limited, and that a royal proclamation prohibiting the importation of arms, ammunition, and the component parts of arms, empty cartridge-cases, explosives and combustibles for warlike purposes into Ireland, was valid under the authority of the section.

Held also, by Cherry, L.C.J., and Dodd, J., that where goods are imported in violation of such a proclamation, the fact that a Customs officer who seizes the goods causes or permits them to be destroyed before proceedings are taken to have them condemned, does not give the owner of the goods any right of action against him.

MOTION on behalf of defendant for judgment or a new trial.

The plaintiffs, who were carrying on business as gunsmiths at Royal Avenue, Belfast, ordered some cases of guns from Hamburg. The guns were duly shipped, consigned to the plaintiffs, and arrived at the port of Belfast. On the 4th December, 1913, while the guns were on their way, the proclamation set out below was issued:—

BY THE KING.

A PROCLAMATION

For Prohibiting the Importation of Military Arms and Ammunition into Ireland.

GEORGE, R. I.:

Whereas, by sect. 43 of the Customs Consolidation Act, 1876, it is provided that the importation of arms, ammunition, gunpowder, or any other goods, may be prohibited by proclamation.

(1) Before CHERRY, L.C.J., and KENNY and DODD, JJ.

And whereas it is expedient that the importation into Ireland of arms and ammunition, and the other goods hereinafter mentioned, should be prohibited : K. B. Div.
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Now, therefore, We, by and with the advice of Our Privy Council, in pursuance of the said Act, and of all other powers enabling Us in that behalf, do hereby proclaim, direct, and order as follows :— HUNTER
v.
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As from and after the date of this Proclamation, and subject as hereinafter provided, arms and ammunition, and the following goods, that is to say, the component parts of any arms, empty cartridge-cases, and explosives and combustibles for warlike purposes, shall be prohibited to be imported into Ireland :

Provided always and it is hereby declared that nothing in this Proclamation shall apply to any arms or the component parts of any arms, or any ammunition, or any empty cartridge cases, which in the opinion of the Commissioners of Customs and Excise are adapted for use, or intended to be used, solely for sporting purposes, or to any explosives or combustibles which in the opinion of the said Commissioners are intended to be used solely for mining or any other unwarlike purposes.

Given at Our Court of *Saint James*, this 4th day of December, in the year of Our Lord one thousand nine hundred and thirteen, and in the fourth year of Our Reign.

GOD SAVE THE KING.

A proclamation under the authority of sect. 8 of the Customs and Inland Revenue Act, 1879, was issued at the same time, prohibiting the carriage coastwise of the like articles.

On their arrival at Belfast the guns were seized by the defendant, an officer of customs, purporting to act under the authority of the proclamation, and they were subsequently destroyed by the police, to whom he had handed them over. No legal proceedings had been taken to declare them forfeited. The plaintiffs claimed damages for the detention and trover and conversion of the goods. The defendant, in addition to traverses, pleaded that the seizure was effected under the authority of the proclamation set forth above, and counter-claimed that the arms

K. B. Div. might be declared to have been forfeited, and for penalties in
 1914. respect of them. The claim by the defendant for penalties was
HUNTER subsequently abandoned on the hearing of the motion. The
v. plaintiffs by their reply, in addition to joining issue, pleaded that
COLEMAN. the proclamation was void, *ultra vires*, and not authorized by the
 statute.

At the trial before Boyd, J., in Belfast, the findings of the jury were as follows:—

“1. Were the plaintiffs owners of the goods in question? Answer—Yes. 2. Did the defendant convert the goods to his own use? Answer—Yes. 3. Did the defendant detain the said goods from the plaintiffs? Answer—Yes. 4. Damages, if any? —£92 5s. 7d.” The sum found for damages was a sum agreed upon between the parties as representing the value of the guns.

Boyd, J., thereupon entered a formal judgment for the plaintiffs, without expressing any opinion as to the validity of the proclamation, leaving that question to be determined by the Divisional Court.

The Attorney-General (Moriarty, K.C.) and the Solicitor-General (Jonathan Pim, K.C.) (with them P. A. O’C. White) for the defendants.

Ronan, K.C., and Campbell, K.C. (with them Gordon, K.C., and James Andrews), for the plaintiffs.

The nature of the arguments sufficiently appears from the judgments.

June 15.

DODD, J.:—

The action is brought by a firm of merchants in Belfast, trading as Hunter & Son, against Mr. Coleman, who is the collector of Custom and Excise in the city of Belfast.

The statement of claim avers that the defendant, as such collector of customs, on the 18th of December wrongfully and unlawfully seized certain goods of the plaintiffs, to wit, eight packages containing arms, which were consigned to the plaintiffs from Hamburg. The claim is also put alternatively as for detention of goods, and for conversion of goods.

The questions submitted to the jury were on the counts for conversion and detention, on which they found for the plaintiffs. The damages were agreed to at £92 5s. 7d., and judgment was entered for that amount.

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The defendant, in addition to other matters of defence not now relied upon, justifies under a proclamation of the King, dated the 4th December, 1913. He also, as collector of Customs, counter-claims for a declaration that the said goods were forfeited, and prays judgment for the sum of £100 penalties under the Act.

The proclamation relied upon purports to be made under sect. 43 of the Customs Consolidation Act of 1876, and under all other powers enabling His Majesty in that behalf.

It has not been argued before us that there are any other powers enabling His Majesty in that behalf. Mr. Ronan, in a brilliant argument, enriched with quotations from jurists of unquestioned authority, contended respectfully that His Majesty had no such power by virtue of his Royal prerogative. The learned law officers did not rely in their argument upon any ground of justification save the section mentioned in the proclamation.

The section runs:—"The importation of arms, ammunition, gunpowder, or any other goods may be prohibited by proclamation or order in Council."

The sole question for our adjudication is—Can His Majesty limit his proclamation to Ireland?

The result of Mr. Ronan's argument is that His Majesty could not, without the assent of Parliament, in the exercise of his prerogative, make such a proclamation, even though the proclamation was extended to the United Kingdom. This would be a new law, and the previous assent of Parliament is necessary for every new law, whether of a general or a temporary nature. His Gracious Majesty cannot legislate.

It is not contested, however, that His Majesty has power under this section to make a proclamation prohibiting the importation of arms, ammunition, gunpowder, and any goods into the United Kingdom. The proclamation in this case would, it is conceded, be good if the words "United Kingdom" had been inserted in

K. B. Div. the proclamation instead of "Ireland." It gives therefore a power in addition to His Majesty's prerogative. The question, therefore, becomes narrower and narrower. What is the limit, if any, to the power thus entrusted to the Sovereign by Parliament?

I propose to find an answer to the question within the Act in which this section finds a place. It is necessary to consider the section in its context, and to have regard to the law as it stood before the statute was passed.

The Act of 1876 was a Consolidation Act. It reproduced in identical words some sections of an earlier Act of 1853, and I accept Mr. Ronan's contention that we must go back to that Act, to the scope of that Act, and to the law as it stood before that Act was passed, to ascertain the true meaning of the section we are to interpret.

Sects. 39 to 44 in the Act of 1876 correspond to sects. 41 to 46 in the Act of 1853. The Act of 1853 superseded an Act of 1845. That Act in turn superseded an Act of 1833. It, in its turn, superseded an Act of 1825. It is not necessary to go back further. The learned Solicitor-General, as the result of his research, says that the provision in the Act of 1845 as to arms and ammunition and gunpowder can be traced back, at any rate, as far as the Stuart kings. All that I can look at for purposes of comparison is, I think, the Act of 1845.

Under that Act, by sect. 63, arms, ammunition, and utensils of war by way of merchandise were absolutely prohibited to be imported into the United Kingdom, except by licence from Her Majesty for furnishing Her Majesty's public stores only; and in the same Act (sect. 112) the *exportation* of arms, ammunition, and gunpowder, military and naval stores, and any articles (except copper) which Her Majesty shall judge capable of being converted into or made useful in increasing the quantity of military or naval stores, may be prohibited by proclamation or order in Council.

The law, therefore, as it stood at the time the Act of 1853 came to be passed gave special control to the monarch in respect of these matters. None of the Queen's subjects could import these goods, and at her Royal will she could prevent them from being exported.

As the section which we have to construe relates not only to arms, ammunition, and gunpowder, but also to any goods, it is necessary to have regard to the state of the law before the passing of the Act of 1853 as regards goods in general. The policy of Parliament was to discourage the importation of foreign goods, and that either by direct prohibition or by prohibitive duties; and to encourage the exportation of home goods, even with bounties. In 1846 an Act was passed which is sometimes referred to as the "Great Charter of Free Trade that cast the shackles from England's Commerce." But the title of that Act is "An Act to amend the Laws relating to the Importation of Corn." It was confined to corn, and such like articles of food. But between that date and this Act of 1853 the policy of free importation of all goods made strides. The doctrine of free imports, or open ports, found favour with the Parliament that sat in 1853. It was by this Act which we are now considering that the doctrine was turned into a legislative Act. By section 41, some four sections removed from the section we are to interpret, it was enacted: "It shall be lawful to import into the United Kingdom any goods which are not by this Act or any law at the time of importation thereof prohibited to be so imported." This is really the section establishing free importation.

But that was not all of the immediately preceding legislation that it is necessary to have regard to. A good many things were happening on the Continent between 1845 and 1853, and some things in Ireland that called for attention in Parliament. Settled governments were threatened. There was what might be called a revolutionary spirit abroad. Traces of this are found in legislative enactments, notably in the Treason Felony Act of 1848. Between 1845 and 1853 there was 1848.

One can well understand the misgiving and alarms as to the possible consequences of the new policy. "Is it not enough" (it might be asked) "to destroy our trade? Are you going also to leave the throne in danger? Can you not draw the line at goods that may affect Her Majesty's army and navy, and Her Majesty's control over arms and ammunition and military and naval stores? Revolutionaries from other countries might bring in foreign arms; malcontents, such as of late in Ireland, can now

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K. B. Div. get military stores with which to attack Her Majesty's troops, or
 1914. imperil Her Majesty's peace. And even from the trade point of
 HUNTER view, foreign competition might crush down the manufacture of
 v. these articles at home, and Her Majesty might then be dependent
 COLEMAN. upon foreign countries for the supply of those naval and military
 Dodd, J. stores which up to this had been so carefully guarded and kept
 within her special control by Parliamentary enactments."

Well, notwithstanding all this, the Act of 1853 repealed the sections in the Act of 1845 prohibiting the importation of foreign arms or ammunition. It is enacted (sect. 41): "*It shall be lawful to import into the United Kingdom any goods which are not by this or any law in force at the time of importation thereof prohibited to be so imported.*" Henceforth arms, ammunition, military and naval stores are admitted free. They are not even made subject to a duty on importation.

A table is given in sect. 44 of goods absolutely prohibited. They are only nine in number. I think it well to go through them in detail:—1. Books copyrighted in the United Kingdom, and reprinted in any other country. 2. False money or counterfeit sterling. 3. Coin, silver of the realm, or any money purporting to be such, not being of the established standard in weight or fineness. 4. Extracts, essences, or other concentrations of coffee, chicory, tea, or tobacco, or any admixture of the same. 5. Malt. 6. Indecent or obscene prints, paintings, books, cards, &c. 7. Snuff work. 8. Tobacco stalks stripped from the leaf. 9. Tobacco-stalk flour.

Of these it will be observed one is to protect the British writers of books from piracy; two relate to false coins; one to indecent literature or pictures; five relate to tea, tobacco, or spirits, coffee, or chicory. None of the prohibitions was an exclusively trade prohibition. Those which did relate to trade relate solely to the *form* in which those goods shall be imported.

Then came some *restrictions*. These are, in my opinion, Custom House regulations for the convenience of the collecting of duties. With one exception—and that exception has to do with cattle which may be excluded for sanitary reasons—they are applicable to dutiable articles, that is to say, silk, spirits, tobacco, and snuffs, cigars, cigarillos, or cigarettes, as they appear to have been then

called. The duty on silk at the time was £15 for every £100 value. *K. B. Div.*
 Plain silk ribbons, of one colour only, were six shillings to the pound, — 1914.
 and so on. Silk could only be imported into the ports of London, —
 Liverpool, Hull, Southampton, Leith, or Dublin, or ports HUNTER
 appointed by the Commissioners of Customs, or into the ports v.
 of Dover or Folkestone direct from Calais or Boulogne, and only COLEMAN.
 in ships of fifty tons burden or upwards. The Commissioners Dodd, J.
 of Customs and Excise could, however, nominate other ports.
 The other goods—spirits and tobacco—were dealt with in a similar
 way.

I must read the Act as I find it. Counsel for the plaintiff argue that the words "prohibition" and "restriction" have a definitely fixed meaning, and are to be treated as words of art. They say what was done in this case by His Majesty's proclamation was "to restrict importation," and a power to "prohibit" does not carry with it a power to restrict. The limitation in this case is one of area. It is an absolute prohibition within a defined area. I cannot find the words "restriction" used in any sense but the one, as something in the nature of a condition precedent to be complied with before the goods are allowed in. When the conditions are complied with, the goods may be let in. When they are not complied with, the goods are prohibited.

I do not omit in this connexion the regulation to which I have already referred as to the ports into which, and into which only, goods such as silk and spirits may be brought. That was obviously for convenience. A staff of officers to inspect such dainty and delicate articles could not be provided by the Customs at every port, and it was partly for the convenience of the trade. It was the same kind of regulation as permits or requires passengers' luggage to be examined at Charing Cross. Goods are brought into a house, though some goods are only admitted through a tradesmen's entrance. If the ports specified were not sufficient for the requirements of the trade, other ports could be added by the Commissioners of Customs. It was a regulated importation into the country. What is complained of in this case is not a "restriction" as the word is used in the Act. It is a total prohibition, but a total prohibition with a limited area.

When a claim is put forward that the proclamation in this case

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interferes with an inalienable common law right of the subject to import arms from abroad, it has to be borne in mind that such right, if it ever existed, had been expressly taken away by statute, in England, as far back as the matter has been traced. The history of legislation on the subject in Ireland has not been pursued; but, at any rate from the Union in 1800 down to this year of 1853, no such right existed, and the section that confers the right is followed almost immediately by a section limiting the right. The right is given subject to the right vested in the Sovereign to prohibit the importation of arms, ammunition, and gunpowder. If you claim the right under this statute, as you must, you must take it with its limitation. The section does not either enact the contingency that may call for the Royal intervention, or limit the purpose for which the power may be put in force. It does not say, "prohibit importation into the United Kingdom." But I think that is the true construction. But even so there is no provision that the power to be so exercised must be extended to the whole. The presumption against any such construction is irresistible. Each section must get full force. But the limitation should be such, I should say, as to interfere to the smallest extent, and within the most limited area that the geographical position of the United Kingdom permits, and for the shortest time, with the ordinary course of trade. It is in the nature of a brake, to avoid danger, to prevent a collision.

It was not confined to arms and ammunition and gunpowder. It was made to cover, if need arose, any goods. The danger might arise from other goods as well as from those first mentioned in the section. Without embarrassing oneself too much about the doctrine of *ejusdem generis*, the putting in the forefront of the section of the words "arms and ammunition and gunpowder" must have had some intent. It gave a clue to the scope of the section. If a clause had to be formulated that would bring in other goods, it would seem to me, having regard to the previous legislation before this Act, it might be formulated thus: The importation of arms, ammunition, gunpowder, or any goods that Her Majesty may think it desirable to prohibit from any apprehension that danger from such importation might arise to Her Majesty's army, or against her authority, or against the peace of

her kingdom may be prohibited into any part of the United Kingdom (including the Isle of Man and Channel Islands) by Royal Proclamation. But I must again insist that such contingency and such purpose are not set forth in the section. And if the proclamation be right on the face of it, this Court cannot inquire into the reasons. Parliament expressly granted to Her Majesty a power unqualified in this regard by any conditions. So far from this being merely a trade section, I think the words at the beginning sufficiently indicate that it was *prima facie* for matters other than those of trade, that is to say, for matters affecting the peace and safety of her people and of her forces, that such an unqualified power was given, and the words "or any other goods" were added so as to make the power meet every emergency.

What is the grievance here? Not that arms are kept out of Ireland, but that they are not kept out of Great Britain, the Isle of Man, Guernsey, Jersey, Alderney, and Sark. If it is not necessary for the purpose the King has in view to *exclude* them from Great Britain, then to *include* Great Britain would extend the proclamation further than was requisite, and would, on the part of His Gracious Majesty, be what we would describe, in the case of an ordinary person, as an abuse of the power. Is he to be prevented from keeping arms out of a place where there may be danger, unless he also keeps them out of a place where they may be required? That is a limitation I cannot find in the Act. The statute leaves him sole judge as to the danger, the emergency, and the need.

The proclamation is drafted so as to cause the slightest possible interference with trade, even with the trade in Ireland, for it deals only with such military arms and articles as may be used, or intended to be used, for warlike purposes. That, I submit, was such an exercise of the power on the part of His Gracious Majesty as would be characterized, in the case of a less exalted personage, as obeying the power in the spirit as well as in the letter.

There was an argument addressed to us with great force and cogency by Mr. Ronan and Mr. Campbell, which seemed to me to conflict with the view I have indicated. That was founded on the parallel power conferred upon His Majesty to prohibit exportation.

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K. B. Dir. It became necessary or expedient in 1900 to prevent military stores from being sent into China. It was stated at the Bar, and I make no doubt accurately, though, of course, we cannot investigate such matters or indeed act upon them in the interpretation of an Act of Parliament, that in the first instance, under the authority of the exportation clause, a proclamation was issued prohibiting the exportation of arms into China. It was withdrawn, and an Act was passed, which, it is said, is an authoritative interpretation by Parliament that such a proclamation was invalid. The force of that contention may be sought to be minimized in various ways. The Exportation of Arms Act, 1900, is the Act referred to. It does not recite that doubts were entertained. It is entitled "An Act to amend the Law relating to the Exportation of Arms, Ammunition, and Military and Naval Stores." That, it may be said, is only an indication that the law officers thought an express Act would, under the circumstances, be more desirable than a proclamation. But I do not so limit the effect of the Act. I prefer to take it as a legislative enactment that the law as it stood before that Act did not authorize His Majesty to differentiate between the places to which goods might be exported. And I accept it the more willingly, that I think that was the true state of the law. But an examination of the two powers—the power to prohibit importation, and the power to prohibit exportation—shows how widely the two powers differ. The contingency on which, and the purpose for which, an order to prohibit exportation may be made are expressly set out in the section. The section now operative, and in operation in 1900, is as follows. It is in the Act of 1879 (sect. 8):—

"Arms, ammunition, and gunpowder, military and naval stores, and any articles which Her Majesty shall judge capable of being converted into or made useful in increasing the quantity of military or naval stores, provisions, or any sort of victual which may be used as food for man."

That section deals only with the internal affairs of the Kingdom. It is a power to keep these things within the Kingdom, because they are, or may be, needed for the well-being and safety of the country, and the supply to Her Majesty's military or naval stores. Provisions and food may be kept at home also

for the same purpose. There is no power to follow the goods or their purpose or use abroad. The place where the proclamation was to take effect was at the King's own ports, to keep the goods within the kingdom. What could be forbidden was exportation from home, not importation into China. It will be observed that the very same policy that was at the root of the power to prohibit importation was at the root of the power to prohibit exportation—the safety of His Majesty's subjects and forces. Neither dealt with foreign policy. The power of prohibiting importation also takes effect at the King's own ports. But he needs no such power, with reference to importation, as was expressly given by the Act of 1900 as to exportation. That Act only confirms the view I have taken. The Act was passed to enable Her Majesty to do for her army and subjects abroad what the power to prevent importation enabled her to do for her army and subjects at home. Power is given to Her Majesty to prevent exportation to a particular country whenever Her Majesty shall deem it “expedient in order to prevent such arms, ammunition, military or naval stores, being used against Her Majesty's subjects or forces, or against any forces engaged, or which may be engaged, in military or naval operations in co-operation with Her Majesty's forces.” Surely this is also a statutory interpretation of the section we are considering. It was at first thought that Her Majesty, under the exportation section, had power to do in China what the power under the importation section enabled her to do in her own dominions. It is a power to prevent goods from being brought into her country whenever Her Majesty shall judge such prohibition to be expedient, in order to prevent such arms and ammunition being used against Her Majesty's subjects or Her Majesty's forces. Why must they be let in? Because sect. 41 of the Act says it shall be lawful. This is the very pedantry of free trade. Why are they to be kept out? Because His Majesty apprehends they may be used against His Majesty's subjects or forces.

I have kept over the ingenious argument based upon the Act of Union. I understand that argument rested upon there being two possible views of the section, and if a view could be taken of it that would make it consistent with the Act of Union, such view should be preferred. The course of my judgment makes it

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K. B. Div. unnecessary for me to go into this in any detail. For the reasons
 1914. I have attempted to give, I think this is an over-riding section.
HUNTER It over-rides even sect. 41 of this very Act, which is the section
v. permitting the goods to be brought in. It would appear to me to
COLEMAN. be a rather difficult interpretation to say that the application of
Dodd, J. the power was lawful if it extended, say, to the Mersey, and
 excluded the Thames, but unlawful by reason of the Act of Union
 if it differentiated between the Lagan and the Clyde. In my
 opinion, the scope of the section, being what I have indicated, pre-
 cludes me from any further inquiry on this head.

There is one minor point urged by counsel for the plaintiffs. It is said the defendant cannot justify under the Act, inasmuch as he did not preserve the goods to abide the determination of the Court as required by the Act. He handed them over to the police, and they destroyed them. And this was undoubtedly wrong. But if the seizure was valid, the property in the goods passed from the plaintiffs upon seizure. If the Court held the seizure wrongful, the subsequent treatment of them by the defendant might subject him to punitive damages. But if the Court held the seizure valid, the subsequent treatment of the goods was not material to the issue. I think the case *Mr. Campbell* cited is to this effect.

For these reasons I think there should be judgment for the defendant on the action, and that the declaration sought for by the defendant in his counter-claim should be granted.

KENNY, J. :—

It is scarcely possible to conceive a case of greater constitutional importance than the present, involving as it does the question of the validity of a great act of State by the King in Council; for it is obvious, and, of course, was admitted by the Attorney-General, that if the plaintiffs are to retain their verdict it must be on the ground that the proclamation by His Majesty prohibiting the importation of arms into Ireland is invalid and ineffective. The case has been cleared of some superfluities in the course of the argument. The Crown have now admitted the plaintiffs' ownership of the goods up to the moment of seizure—a fact which was disputed at the trial—and they have withdrawn their counter-claim for penalties. The Attorney-General, in

taking this course, has expressed the desire of the Crown that the net question on which the decision of the Court is required, namely, the legality of the proclamation, should be presented to and dealt with by the Court, unembarrassed by any other contentions, and as, in fact, the sole question in the action.

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The importance attached to this question by the advisers of the Crown is not diminished by the closely reasoned argument of Mr. Ronan, which had for its main support the contention that the upholding of the validity of the proclamation meant the negation and substantive repeal *pro tanto* of trading rights established by the great Charter, and of that equality of treatment which the Act of Union secured to the people of Ireland. It was not denied that such a power of repeal might by statute be reposed in the King,—or indeed in any other person or body that Parliament chose,—but grave considerations were suggested indicating that such a power was not conferred by the section of the Act of 1876 which has given rise to the difficulties of interpretation with which we have to deal. If the power was not conferred by that section, there is no warrant for the proclamation, and therefore no justification at law for the seizure and detention of the plaintiffs' goods.

Before discussing the nature and efficacy of the alleged statutory power, I may very briefly state the circumstances in which what I may call the impeached proclamation was issued. It is dated the 4th December, 1913, and is one of two proclamations bearing the same date. They are both made by the King "by and with the advice of his Privy Council," and both deal with the same class of goods, namely, "arms and ammunition . . . component parts of arms, empty cartridge-cases, and explosives and combustibles for warlike purposes," but they differ in the essential particular that one purports to be made under the 43rd sect. of the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), and prohibits the importation of any of these goods into Ireland, while the other is made under the 8th sect. of the Customs and Inland Revenue Act, 1879 (42 & 43 Vict. c. 21), and prohibits their carriage coastwise. The distinction between the two proclamations is thus very marked; inasmuch as the coastwise proclamation applies to the entire of the United Kingdom, while the other

K. B. Div. affects only one specific part, namely, Ireland. It is further to
1914. be specially noted that although the Crown contend that the
HUNTER 43rd sect. is what the Attorney-General calls an emergency section,
v. and although both proclamations contain a recital that it is
COLEMAN. expedient to direct the particular prohibition, neither contains
Kenny, J. anything in the nature of a recital or statement to the effect that
a state of war or any threatened danger to any part of the realm
existed, or, in fact, that any emergency had arisen to provoke the
exercise of those extreme powers. If such an emergency had
as a fact arisen, it might, I apprehend, have been open
to the Crown,—though I offer no definite opinion on the
point,—to have produced evidence of it at the trial, but no
trace of such evidence having even been offered or suggested
appears in the shorthand notes which have been adopted as his
report by the learned judge who presided at the trial. The
Attorney-General, in opening the arguments, did indeed suggest
that the Crown had not issued those proclamations without a
definite object, and he made use of the phrase that “people cannot
shut their eyes to what is going on,” but I need scarcely say that
a very difficult and, as I think, ambiguous section of a statute is
not to be aided in its interpretation by circumstances which, how-
ever much the subject of popular report, were not cognizable by
this Court on the present argument. If the framers of those
proclamations had been much impressed by the gravity of the
matters thus glanced at by the Attorney-General, I have little
doubt that the recitals of expediency would have assumed a
stronger form. However that may be, there is nothing to indicate
any exceptional circumstances or any emergency necessitating
this action of the Executive, and we must, therefore, assume that
on the 4th December, 1913, when the proclamations were issued,
the United Kingdom was in a condition of absolute peace and
tranquillity and that merchants were entitled to enjoy and exercise
throughout the realm the right of trading in all ports which was
secured to them by Magna Charta and by immemorial custom.
In that state of things we have to determine whether a proclama-
tion which purports to close all the ports of one part of the United
Kingdom for the reception from abroad of certain articles of
merchandise consigned to traders at such ports, has the sanction

of an Act of Parliament. The Crown claims that the 43rd section of the Act of 1876, to which I have referred, contains such sanction by conferring a delegated power of legislation on the King in Council, and that the prohibition against importation can be maintained under the authority of this statute. The history of the King's Prerogative with reference to ordinances and proclamations—the original system of Royal legislation by those acts of State—the Statute of Proclamations in the reign of Henry VIII, conferring on the King the widest legislative functions by proclamation,—the repeal of that statute in the reign of Edward VI, because it was calculated to introduce the most despotic tyranny,—the remonstrance in 1610 of the Commons against proclamations by the King,—and, finally, the protest by Sir Edward Coke and other judges in the same year, which was accepted as finally establishing that the King cannot change any part of the common law and that Royal proclamations have in no sense the force of law and cannot create an offence which was not an offence before, are all familiar matters to the student of constitutional law. The objects, effects, and validity of proclamations, dealing especially with trade and merchandise, and the power of closing the ports, are discussed with considerable detail and learning in 1 Hargreave's Law Tracts, from the manuscript of Lord Hale. Hargreave, at page 97 of his tract, dealing with the *jus regium* in ports of the sea in relation to commerce and trade, says:—"And upon the whole matter it will appear from the several Acts of Parliament that have been made for the support and increase of trade and for the keeping of the sea open to foreign and English merchants and merchandise, that there is now no other means for the restraint of exportation or importation of goods and merchandises in times of peace, but only when and where an Act of Parliament puts any restraint." The next tract (pp. 97 and 99), "Concerning the *jus regium* in the ports with relation to the Customs," refers to the *Town of Southampton Case* (1), where there was a grant or charter by Philip and Mary to the bailiff and burgesses of Southampton that no malmsey should be imported at any port but Southampton under pain of treble custom. Wines having been landed elsewhere, an informa-

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(1) 2 Coke's Inst., p. 61.

K. B. Div. tion was filed, and after argument in the Exchequer it was decided
 1914. that the restraint in such a grant or charter was against the laws,
 HUNTER statutes, and customs of the realm. That the law as stated by
 v. Lord Hale has undergone no change so far as acts of the King, or,
 COLEMAN. in other words, of the Executive Government, are concerned, is
 Kenny, J. recognized in Lord Halsbury's treatise on the Laws of England,
 vol. vi, at p. 460, where the law as now established is stated as
 follows:—"In time of peace the Crown may not, in general,
 restrain the free importation and exportation of goods by closing
 the ports or laying an embargo on shipping, nor can the Crown in
 time of peace limit the importation and exportation of particular
 goods, or goods generally to particular ports. In time of war,
 exportation or importation may be restrained by the laying on of
 a general embargo when it is warranted by necessity, or by the
 promulgation of blockades, and the necessity arising from public
 danger, or a state of war might, it is apprehended, justify the
 closing of the ports."

The law being thus quite definite, the only question for our consideration is one of construction. Does the 43rd section of the Act of 1876 enable the King in Council,—in a time of peace,—to issue a proclamation whereby, if it be valid, the ports of a large portion of the United Kingdom are closed to the importation of certain merchantable goods, while the ports of the remainder of the kingdom are to remain open ports for the same class of goods? There can be no doubt that the section, in very express terms, authorizes a general prohibition against importation, but does it sanction differentiation? If the proclamation had prohibited importation of arms into *any* part of the United Kingdom, no exception could possibly be taken to it, for the Legislature has unmistakably conferred on the King the power of general prohibition, and the proclamation would have been on the same lines as the coastwise proclamation. I shall briefly refer to the Acts affecting prohibition against importation, exportation, and carriage coastwise.

The 43rd section of the Act of 1876, which is identical in terms with sect. 45 of the Customs Consolidation Act, 1853, deals with importation, and is as follows:—"The importation of arms, ammunition, gunpowder, or *any other goods* may be prohibited by proclamation or order in Council," while the Act which now

governs exportation and carriage of goods coastwise is the Customs and Inland Revenue Act, 1879 (42 & 43 Vict. c. 21), sect. 8 (substituted for the 138th section of the Act of 1876), as supplemented by the Exportation of Arms Act, 1900 (63 & 64 Vict. c. 44), sects. 1 and 2. The Act of 1879 provides that the following goods may, by proclamation or order in Council, be prohibited either to be exported or carried coastwise, viz.:—"Arms, ammunition, and gunpowder, and military and naval stores, and any articles which Her Majesty shall judge capable of being converted into or made useful in increasing the quantity of military or naval stores, provisions or any sort of victual which may be used as food for man." The Act of 1900 deals with exportation alone. It gives power to prohibit exportation to any country or place when such prohibition is expedient in order to prevent the particular goods being used against His Majesty's subjects or forces, or against any forces engaged, or which might be engaged, in military or naval operations in co-operation with His Majesty's forces. Seizure, forfeiture, and penalties for the importation into the United Kingdom of prohibited goods are provided by the 42nd, 177th, and 186th sections of the Act of 1876. By sect. 151, the Customs Acts—of which the Act of 1876 is one—are to extend to, and be in full force and effect in, the several British Dominions abroad, except where otherwise expressly provided for by these Acts, or limited by express reference to the United Kingdom, or except where particular provision is made by local Act.

The present proclamation is, as we have been informed by the Attorney-General, who speaks with all the authority of and means of information possessed by the Customs officials, the first that has been issued under the 43rd section, or under the corresponding, but repealed, 45th section of the Act of 1853—although the powers conferred by those sections have been in force for over sixty years. The nature and extent of those statutory powers consequently require, and, in the course of the long discussion before us, have received, a close examination,—the Crown's contention being that the provisions of the Customs Acts may be divided in character and objects into two classes, namely, such as have been introduced for the purposes and protection of revenue,

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K. B. Div. and such as might be classed as concerned with the defence of the
 1914. realm and with public policy,—that the sections of the Acts
 HUNTER dealing with munitions of war fall into the latter category, and
 v. that it would be opposed to the principle of the Act to give a
 COLEMAN. construction to the section which would limit the King's power,
 Kenny, J. in a case of emergency, to apply the section to only a particular
 part of the realm. I cannot, on a fairly careful review of those
 numerous Customs Acts, agree with the Attorney-General that
 the clauses can be classified as suggested. Primarily, at least, the
 Acts are Revenue Acts, and I find nothing to suggest that arms
 and munitions of war should be referred to a principle or category
 different from that of other commodities.

The chief modern Acts of Parliament dealing with Customs are those of 1825 (6 Geo. 4, c. 107), 1833 (3 & 4 Will. 4, c. 52), 1845 (8 & 9 Vict. c. 86), 1853 (16 & 17 Vict. c. 107), and 1876 (39 & 40 Vict. c. 36). The first three are Customs Regulation Acts, while those of 1853 and 1876 are Customs Consolidation Acts, the latter being the main governing Act at the present time. By the Acts of 1825 (sect. 52), 1833 (sect. 58), and 1845 (sect. 63), the importation into the United Kingdom of arms, ammunition, and utensils of war, "by way of merchandise," and of gunpowder, was absolutely prohibited, "except by license from His Majesty for furnishing His Majesty's public stores only"; but by the Acts of 1853 (sect. 41) and 1876 (sect. 39) that prohibition was removed, and it was enacted (16 & 17 Vict. c. 107, s. 45; 39 & 40 Vict. c. 36, s. 43) that the importation of arms, ammunition, gunpowder, or *any other goods* might be prohibited by proclamation or order in Council. Arms and ammunition are treated as merchandise in the Acts of 1825, 1833, and 1845, and, in the lists of absolutely prohibited articles in those Acts, are associated with some of the most ordinary commodities. Even in the Acts of 1853 and 1876, which were passed after free trade had been practically established in the United Kingdom, absolute prohibition against importation of many articles of merchandise is retained, while the importation of arms, ammunition, and gunpowder is for the first time permitted, unless prohibited by proclamation or order in Council. In my opinion, these Acts are simply Revenue Acts, and do not purport to do more than encourage and protect

trade and commerce and secure the levy of Customs duties, and are in no otherwise directed to or intended for the protection or defence of the kingdom, and I am fortified in that conclusion by their titles and preambles, which, to my mind, indicate that these were their only objects.

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The next argument of the Crown in support of the proposition that a power of discrimination must have been contemplated is based on the earlier Acts, under which it is contended that the King could exercise a discretion as to the port or ports to which his licence should extend,—that the Acts of 1853 and 1876 introduced a new policy by permitting importation unless it was prohibited, as a substitution for absolute prohibition unless there was permission, and that these sections must receive an interpretation which in principle would not be opposed to the former law which allowed a discretion as to the area of a licence. The argument is a weighty one, if it be assumed that the King could in his licences have differentiated as to ports—and if these sections of the Acts of 1853 (sect. 45) and 1876 (sect. 43) had dealt only with arms, ammunition, and gunpowder, omitting the reference to “any other goods,” my mind would have been much affected by it,—but, as the sections stand, I cannot come to the conclusion that the power of exclusion (assuming it to exist), involved in the granting of a licence, is necessarily extended to a clause dealing with prohibition and differently worded. If these sections allow of a discrimination as to area in regard to the arms, they also do so as regards “any other goods,” and it could not possibly be argued that before 1853 licences from the King under the Customs Acts were referable to any goods except arms, ammunition, and gunpowder. The power,—if it exists,—at any time in time of peace to prevent the importation of flax into Belfast, or cotton into Liverpool,—to take two ordinary illustrations,—is an absolutely new power conferred by the Act of 1853—not, in my opinion, by way of substitution for any previously existing power with which it could be compared, but a power quite independent of all previous legislation. It therefore seems to me that these sections of the Acts of 1853 and 1876 must, when dealing with questions of the area of prohibition, be construed on their language as they stand, without invoking aid from the earlier statutes.

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Two other contentions on the part of the Crown deserve notice. The first is based on section 151 of the Act of 1876,—a section which appears for the first time in any of the Customs Acts, and which enacts that they are to extend to and be in force in the several British possessions abroad, except (*inter alia*) where otherwise therein expressly provided for by or limited by express reference to the United Kingdom. The argument is—that having regard to that section a proclamation under the 43rd sect. of the Act of 1876 could prohibit importation into any colony that did not come within the exceptions in the section, and that if the plaintiffs' view of the Act be correct, a proclamation could not be applied to the United Kingdom without its being also applied to such of the British possessions abroad as did not come within those exceptions. I think there is more than one answer to this argument. In the first place, it seems to me to be clear that the 43rd sect. is, in the language of sect. 151, limited by express reference to the United Kingdom, and is therefore excepted from the operation of sect. 151. The sections of the Act are grouped together with headings—for instance, the group in which the 43rd section appears is headed, "As to the Importation, Prohibition Entry, Examination, Landing, and Warehousing of goods," and that group comprises eleven sections, in five of which the United Kingdom is referred to in express terms as the country of importation (save when the Channel Islands are included), and in the others, in my opinion, by clear implication. It seems to me impossible to hold that a section, like the 43rd, appearing in the very centre of this group, and surrounded by sections with express references to the United Kingdom, could be severed from what is really its context, and applied to a subject-matter in no way akin to the purposes and objects of the other sections of the group.

A second reply to this argument founded on the 151st sect. is this. No doubt this section purports to extend the Customs Acts to the British possessions abroad. But to what extent? While the section may possibly be held as applying the clauses relating to reports of cargoes, liability to search, warehousing of goods, warrants for landing, and such like administrative details,—as to which I offer no opinion,—it is in my judgment clear that it does

not extend to sect. 43. Just as the latter section is the centre of a group of clauses with a special heading, so is the 151st sect. the centre of another group, which has for its heading, "As to the Channel Islands and other Possessions," and which deals with prohibition of several of the articles already set forth in and prohibited by sect. 42. This seems to be an indication that so far as sect. 42 and its list of prohibitions are concerned, they were not intended to apply to British possessions abroad, while at the same time it supplies an argument also against the extension of sect. 43; for if the latter was so general and so elastic as to support a proclamation prohibiting importation to the Colonies, why should there be subsequent specific provisions for the purpose?

It is also said that the power of prohibition given by the 43rd section is not restricted to an act of State by the Monarch, but that the section contemplates the possible exercise of the power by governors of colonies and by the Lord Lieutenant of Ireland. If that argument were sound, *cadit questio*, inasmuch as such proclamations and orders in council could have no effect beyond the territorial limits of the particular country where they were made and must necessarily result in different conditions. But it is to be observed in the first place that the power of controlling importation from either the British Colonies or foreign countries is *prima facie* an essential part of a great imperial jurisdiction that might in its exercise involve communications and negotiations abroad on the part of the Colonial or Foreign Office, and one would expect that, if there was to be a delegation of that power, express words would be employed for the purpose and that it would not be left to mere inference and conjecture. Irish courts and proceedings in Ireland are referred to in several sections, yet there is no reference of any sort to a proclamation or order of Council by the Lord Lieutenant in Council or even by the Irish Privy Council. I think an indication of the particular Privy Council by and with whose advice the act of State is to be accomplished is given by the 42nd section in the list of goods prohibited to be imported. Infected animals are an item in that list, and a power of prohibition in relation to parts of the carcasses of cattle is given to the "Privy Council," an expression which by sect. 12 (5) of the Interpretation Act, 1889 (52 & 53 Vict. c. 63),

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K. B. Div. is to mean "The Lords and others for the time being of Her Majesty's Most Honourable Privy Council," except when used "with reference to Ireland only." Here there is no reference to Ireland. If the Crown be right in contending that sect. 43 can include an act of the Lord Lieutenant of Ireland in Council, it gives rise to the inconsistency—and I may add, absurdity—that the prohibition of infected carcasses,—a small administrative detail,—is reserved for His Majesty in Council alone, while the Lord Lieutenant is clothed with the great imperial power of forbidding importation of any sort. In my opinion neither the Lord Lieutenant in Council nor governors of colonies have vested in them under the 43rd section the power of prohibition therein contained.

In endeavouring to construe the 43rd section we do not, I think, gain much assistance from attempts at interpretation of the provisions relating to exportation and carriage coastwise, inasmuch as the 8th section of the Customs Act of 1879 (42 & 43 Vict. c. 21), which deals with exportation and carriage coastwise, and their prohibition, raises, as it seems to me, much the same question that we have to consider in connexion with section 43; and if the proclamation is bad as to importation, a proclamation against exportation or carriage coastwise from or to selected parts of the United Kingdom would *a fortiori* be invalid. But the exportation and coastwise clauses (sect. 133 of 39 & 40 Vict. c. 36; sect. 8 of 42 & 43 Vict. c. 21) supply this argument. If they were as wide in their powers as they are claimed to be, a proclamation under them could have prohibited exportation to any particular country or place, yet in 1900 the Exportation of Arms Act of that year (63 & 64 Vict. c. 44) empowered the Monarch by proclamation to prohibit, under certain circumstances, the exportation of arms, ammunition, and other articles to any country or place named in the proclamation. So that it was apparently assumed by the Legislature in 1900 that the general power of prohibition of exportation contained in the Act of 1879 did not confer a discretion as to the area and that further statutory authority was needed.

The general power of prohibition in the 43rd section is wide in the extreme,—so wide that one cannot but wonder what the

Legislature was contemplating when it conferred it. These Customs Acts have merchandise, and trade, and revenue, and the development and protection of commerce, for their subject-matter, and once the argument of *ejusdem generis* has been abandoned,—as it has been in this case by the Crown,—it remains for us to realize that the King,—or rather the Executive Government of the country for the time being,—can under this section prohibit the introduction from abroad of goods of any description into the United Kingdom. They could stop at any moment the whole import trade of the country. I have heard no argument to the contrary, but merely a response which amounts to an admission. But this tremendous power of closing *uno flatu* all the ports of the United Kingdom, and thereby causing universal stoppage, would not, if exercised, necessarily favour any one part of the realm to the detriment of another. The injurious consequences to trade and commerce would be spread over the whole kingdom, and there would be no inequality of treatment such as might occur if the Executive had power under the section to discriminate as to area.

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I think I have dealt with the main arguments of the Crown. They may be thus summarized:—The words of the section are clear and unambiguous,—they are uncontrolled as to area,—general importation can be prohibited,—the greater includes the less,—and consequently the section authorizes the placing of any part of the United Kingdom under a trading disability as contrasted with other parts.

On the other hand the plaintiffs contend—(1) that the section supports only one proposition, namely universal prohibition; and (2) if there be a doubt as to that precise rendering of it, then that it is ambiguous and equivocal and the ordinary rules of interpretation applicable to cases where a possible construction would infringe on the common law and on the liberty of the subject, must be invoked. The foundation for the plaintiff's first contention is that the Customs Acts show that a distinction is drawn throughout between "prohibition" and "restriction," and that while the latter expression refers to cases of prohibition *sub modo*, such as importation in ships of a certain size, or into certain named ports, the former signifies universal stoppage, and that the 43rd section must be interpreted according to that meaning of the

K. B. Div. word "prohibit." I am unable to adopt this suggestion. In
 1914. each case there is "prohibition," and it will be seen that in the
 HUNTER table of prohibitions and restrictions set forth in the 42nd section
 v. of the Act of 1876, "prohibitions" and "restrictions" are all
 COLEMAN. grouped together under the heading, "goods prohibited to be
 Kenny, J. imported." I therefore think that the argument is not well
 founded which relies on the use of these words in other sections
 as being a guide to the meaning of the word "prohibited" in the
 43rd section.

But, while I cannot say that any argument has been adduced which satisfies me that the words of the section are so reasonably clear in themselves as to demonstrate that they do not confer a power of differentiation, there are considerations which in my opinion distinctly point in the direction of the absence of any such power, and show that, at the least, the section is capable of a double meaning and must be regarded as ambiguous. In dealing with the contention of the Crown, I have referred to some of these considerations, but there are others of equal if not of greater cogency. Take the 42nd section with its list of prohibitions and restrictions. It is manifest from that list that where it was intended to give a power to confine the importation of certain goods to a special area, that power is given in very plain and precise language. Furthermore, the 43rd section itself includes not only arms, ammunition, and gunpowder, but "any other goods"; and under it, the Executive, if this proclamation be legal, can in time of peace close any port or ports to the reception of any class of merchandise in addition to mere munitions of war. Stoppage of cotton and foodstuffs into Liverpool and Manchester,—iron into Sheffield,—wheat and barley into Dublin,—tobacco, flax and shipbuilding materials into Belfast—are but a few illustrations of trade injustice capable of being brought about if the Crown can discriminate under this section. Was such an autocratic power ever intended to be conferred? We have been told by the Attorney-General that we should not attribute to His Majesty or his advisers the probability of any such inequitable action, and that such discrimination is never likely to be exercised; but it is not for us on this motion to consider the element of harshness or injustice. What we have to determine is its legality if such

action be resorted to. All these considerations in my opinion strongly support the reasoning that the power of differentiation was not conferred.

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If, therefore, the section be susceptible of two contradictory meanings, which of them ought to prevail? They must be considered in connexion with the existing common law; and regard must be had to the fact that the section is a penal one. I have endeavoured to show what the common law was at the date of the Acts of 1853 and 1876. As to the section being a penal one, I think the question admits of no doubt when the results of a breach of its provisions are considered. The 177th section provides for forfeiture of illegally imported goods, and section 186 imposes penalties on the importer and others. I cannot agree with the Attorney-General, who argued that the 43rd section was beneficent in its objects, while at the same time admitting that the 186th section was penal. The three sections I have mentioned must be all read together if one is to judge of their character as a whole.

The 43rd section is repugnant to the common law if the operation attributed to it by the Crown be possible. The common law, as expressed in Magna Charta, secured to the community, and especially to the mercantile section of it, free intercourse with, and equal rights in, all ports of the kingdom. The Customs Acts deal with and are enacted in the interests of trade and commerce, and it would be opposed to those interests and to the principle of trade equality if the power of differentiation existed. If the particular meaning would infringe on the common law rights of the subject, that construction ought, in my opinion, to be favoured which, while giving complete force and expression to the plain language of the enactment, would refuse to make certain its uncertainty. The common law rights of the subject are not to be abridged by mere inference and conjecture, and, whatever these rights are, they are enjoyed by the inhabitants of the United Kingdom as a whole, and are, so far as Ireland is concerned, recognized by the Act of Union with Great Britain. If the common law was to be altered, it is not by the equivocal meaning of a few words in a single section of an Act of Parliament that such a result should be attained. A statute must be

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expounded not according to the mere letter of it, but according to its spirit, intention, and object; and I can find no trace in the Act of 1876 of any intention to place at the disposal of the King so vast and far-reaching a power and one so capable of inflicting harm and injustice, as the contention of the Crown, if right, would support. This argument, based on the repugnance to the common law of such an interpretation, is strengthened when it is remembered that we are dealing with a penal statute. There can be no question that from whatever point of view the section be regarded, its meaning must be collected from the words used by the Legislature, but if in the case of a penal statute a reasonable interpretation can be given which will avoid the penalty, that construction should be adopted: *Tuck & Sons v. Priester* (1), per Lord Esher, M.R. If the power claimed by the Crown be within the words and the spirit of the statute, the latter should be construed like any other instrument; but when a new offence is created, we should be satisfied that the act alleged to be an offence is within the plain meaning of the words of the enactment. Lord Loreburn, in *Attorney-General v. Till* (2), states the rule in terms similar to these. At p. 51 he says:—"I attach great importance to the rule that unless penalties are imposed in clear terms they are not enforceable"; and, proceeding to discuss the question of an equivocal clause, he adds:—"Where various interpretations of a section are admissible, it is a strong reason against adopting a particular interpretation if it shall appear that the result would be unreasonable or oppressive." I find it impossible to come to the conclusion that the power to differentiate would not be both unreasonable and capable of working great oppression.

Unless this proclamation could be clearly supported by statutory authority, it fails in the essential characteristics that could render a King's proclamation binding, namely, where, as stated by Blackstone, "neither contradicting the old laws, nor tending to establish new ones, it enforces only the execution of such laws as are already in being" (2 Stephens's Blackstone, 616, 617). In these circumstances I am of opinion we should hold that the 43rd section does not authorize a discretion as to the area of

(1) 19 Q. B. D., at p. 638.

(2) [1910] A. C. 50.

prohibition, and that the proclamation has been made without authority and is invalid. The result of so holding would, of course, be that all seizures under the putative authority of this proclamation would be illegal.

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In the view I take it becomes unnecessary for me to offer an opinion on the contention founded on the 177th, 186th, 202nd, 207th, and 208th sections of the Act of 1876, and the 11th section of the Customs Act of 1879 (42 & 43 Vict. c. 21), namely, that a seizure and detention of the plaintiff's goods could not be deemed to be valid until after proceedings had been taken for forfeiture and condemnation, and that until condemnation the property in the goods did not pass to the Crown.

In my opinion the plaintiffs are entitled to retain their verdict, and the defendant's counter-claim should be dismissed, and the present application of the defendant to enter judgment for him refused.

CHERRY, L.C.J. :—

This is an action for the detinue, trover, and conversion of eight packages containing arms, which were consigned to the plaintiffs from Hamburg on the 2nd December, 1913, and were seized by the Customs authorities on their arrival in Belfast on the 18th December, 1913. The defendant is the collector of Customs in Belfast, and the grounds of defence relied upon are that the goods were legally seized by him under, and by virtue of, a proclamation issued by the King on the 4th December, 1913, prohibiting the importation of arms into Ireland. There is also a counter-claim seeking (1) a declaration that the arms seized were duly forfeited; and (2) the recovery of a penalty of £100 from each of the plaintiffs under the Customs Acts.

The action was tried at the last Belfast Assizes before Boyd, J., and a special jury. There was no substantial dispute as to the facts at the trial. The questions of ownership of the goods and the amount of the damages were left to the jury, who found for the plaintiff for £92 5s. 7d. damages. The judge gave judgment for this amount with costs, but he expressly tells us in his report that in doing so he intended to give no decision as to the validity or invalidity of the proclamation relied upon in the defence, but

K. B. Dir. reserved this question for the Court. The defendants, who are
1914. — substantially the Commissioners of Inland Revenue, now expressly
HUNTER waive all questions as to the ownership of the goods, and the
v. amount of damages, and seek to have the judgment set aside
COLEMAN. merely in order to establish the validity of the proclamation, and
Cherry, of the seizure made under it. This is the chief question for
L.C.J. our determination.

Two proclamations were issued by His Majesty by order in Council on the 4th December, 1913. One, which is not now in question, under the powers conferred by sect. 8 of the Customs and Inland Revenue Act, 1879, prohibited arms and ammunition and explosives and combustibles for warlike purposes from being carried coastwise. This proclamation is general in its terms, and is not restricted to any particular locality. Consequently it applies throughout the whole United Kingdom, and prevents the goods described in it from being carried from any one port to any other in the United Kingdom, whether the two ports are both situated in England, or in Ireland, or one in England and the other in Ireland.

The other proclamation, the validity of which was boldly challenged by the plaintiffs in this action, is issued under the powers conferred by sect. 43 of the Customs Consolidation Act, 1876. It prohibits the importation *into Ireland* of arms and ammunition, and the component parts of any arms, empty cartridge, cases, and explosives and combustibles for warlike purposes. It declares on its face that it is not to apply to any such goods which, in the opinion of the Commissioners of Customs and Excise, are adapted for use, or intended to be used, solely for sporting purposes, or to any explosives or combustibles which in the opinion of the Commissioners are intended to be used solely for mining or any other unwarlike purposes. These latter limitations were not referred to in the course of the arguments, but they have, in my opinion, an important bearing upon the question which we have to determine as to the power of the Crown to limit the extent of the proclamation when acting under the section purporting to confer power to prohibit importation in general terms.

The 43rd section of the Customs Consolidation Act, 1876, under which the disputed proclamation has been issued, is

identical in its terms with the 45th section of the earlier Act (16 & 17 Vict. c. 107). Strange to say, no proclamation appears ever to have been issued under either section, and, as far as I am aware, there has been, in the course of sixty years, no judicial decision bearing upon the question of the construction of either section. We have, therefore, now to determine, for the first time, the scope and extent of the powers conferred, and it is not surprising, though it is unfortunate, that there should be a difference of opinion among the members of the Court upon the matter.

The section is very brief and very vague in its terms. It simply provides that "the importation of arms, ammunition, gunpowder, or any other goods may be prohibited by proclamation or Order in Council." The Act of which it forms part is one of the Customs Acts, and these Acts are not confined in their operation to the United Kingdom, but extend, with certain exceptions, to British possessions abroad (39 & 40 Vict. c. 36, sect. 151). It would appear then, *prima facie*, that the scope of sect. 43 is not confined to the United Kingdom, but that it extends to the whole British Empire, subject to the exceptions contained in the last-mentioned section of the same Act. Mr. Campbell argued very vehemently that its operation was confined to the United Kingdom, upon the ground that there were no means of enforcing it in any of the Colonies or Dependencies. But this is by no means clear. Many sections of the Act of 1853, under which it could be enforced outside of the United Kingdom, remain still unrepealed. The Attorney-General referred in particular to the 188th section; and I am clearly of opinion that its scope cannot be limited to the United Kingdom alone, having regard to the 151st section of the same Act.

The main contention of the plaintiffs was that any attempt to limit the area to which the proclamation should apply, beyond that contained in, or implied by, the section giving power to issue it, rendered the proclamation itself invalid. The proclamation, in terms, prohibits the importation of the forbidden goods into Ireland only; and leaves it quite free into any part of Great Britain; consequently it was argued that it was void and inoperative. It was admitted that the King (acting, of course, through his responsible

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ministers) might limit the operation of the proclamation in time; that he might put it in force up to a particular date, or revoke it at any time he thought fit to do so. It was admitted also that he could discriminate as to the classes of goods which might be restrained from importation. No objection was taken to the exceptions from the proclamation of arms intended to be used for sporting purposes only, or of explosives or combustibles for mining purposes; so that the King's power was not limited merely to putting into force the section under which he acted. If, therefore, he has a discretion in these matters, why should he not also have one as to the precise locality within which the proclamation should operate? Does not the greater power include the less? and if he can issue a proclamation in general terms applying to every part of his dominions to which the section empowering him applies, why can he not also issue one for any defined area within these limits? Every argument of convenience and common sense is in support of this view. Why should the inhabitants of England and Scotland be inconvenienced more than is necessary because it is considered expedient to prevent arms being brought into Ireland? And if the section extends, as I think it does, to some at all events of the Colonies and Dependencies over which His Majesty rules, as well as over the United Kingdom, does it not seem almost an absurd conclusion that no power is conferred to prohibit the importation of arms into, say, the island of Jamaica, in the event of serious disturbances occurring there, without at the same time prohibiting such importation into the entire United Kingdom? I should certainly not come to such a conclusion unless I were coerced to do so by the most cogent arguments, for it appears to me to be opposed to all the principles which have hitherto guided our Courts in the interpretation of Acts of Parliament. In Maxwell on the Interpretation of Statutes, a book of high authority on the subject, it is laid down (1), and I think rightly laid down, that "in determining either what was the general object of the Legislature, or the meaning of its language, in any particular passage, it is obvious that the intention which appears to be most agreeable to convenience, reason, justice, and legal

(1) 5th ed., p. 309.

principles, should, in all cases open to doubt, be presumed to be the true one. An argument drawn from an inconvenience, it has been said, is forcible in law; and no less, but rather more, force is due to any drawn from an absurdity or injustice."

The principal argument put forward against the power of the King to limit the area of the proclamation to some defined part of his dominions, was that such a power might be improperly used to favour one part of the kingdom at the expense of another. The proclamation, it was said, need not be confined to arms or munitions of war; it might extend to any class of goods. The words in sect. 43, "or any other goods," cannot, it was argued, be read as *ejusdem generis* with those which precede them. They must include all commodities, so that if the power of discrimination as to place exists, an order might be made prohibiting the importation of coal or tobacco into Belfast, while permitting it into Dublin. In that way an unscrupulous ministry, acting in the name of the King, might penalize, it was urged, some locality which did not give it support.

The answer to this argument is, I think, a simple one. If any discretion whatever is left in the hands of the donee of a power, it may be improperly executed to the prejudice of the objects of the power or some of them; but this fact has never been allowed to be put forward as an argument for limiting the generality of the power, when properly exercised. The King is here in the position of the donee of a statutory power. It must not be assumed that he will exercise it unjustly to the prejudice of some portion of his subjects. And I do not think the case is different because he acts, as of course he does, on the advice of his responsible ministers.

But there is another, and I think a better, argument against this view, namely this, that the King, or an unscrupulous ministry advising him, could inflict quite as much injustice upon certain classes of his subjects by a general prohibition of importation as by a prohibition limited to particular localities. Where there is a competition, for instance, between home and foreign manufacture of an article of a particular class, a general prohibition of importation of the manufactured article might very seriously injure the consumers of it for the sake of benefiting the home

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producers. So that if the argument based upon the possibility of an unjust exercise of the power is pushed to its logical conclusion, it would apply to any exercise of the power at all, and render the section a dead letter!

But the plaintiffs did not limit their arguments, on this branch of their case, to the possible injustice of a wider discretion being vested in the Crown. They cited many ancient authorities to show that at common law it had always been held that the King could not by his proclamation restrict the importation of goods to any particular port or ports of his kingdom. The *Town of Southampton Case* (1) in the reign of Philip and Mary; Hale, *De Portibus Maris*; and Chitty on Prerogative, were, amongst other authorities, freely cited in support of a proposition which no one disputed. But this argument, like the other which I have mentioned, carries them too far; for it is equally true that the King cannot, in time of peace at all events, restrain the general importation of goods into the kingdom any more than he can restrict the importation to a particular port or ports. In the famous "Case of Proclamations" (8 Ja. 1, 1610) it was resolved by the judges upon conference between them and the Privy Council that the King cannot by his proclamation change any part of the common law, statute law, or customs of the realm; nor can he create any offence by his prohibition or proclamation, for that would be to alter the law. He may, however, by proclamation admonish his subjects to keep the laws, and subsequent disobedience is an aggravation of the offence (2). Such is the law at the present day, but it gives no support to any theory of a distinction between the power of the Crown to issue a general prohibition and to issue one confined to a particular locality. The power to issue a general proclamation under the Customs Acts stands, as far as the common law is concerned, in the same position as that to issue one confined to a particular locality.

Other arguments of a more technical character were pressed upon us, with much force, by counsel for the plaintiffs. The principal one relied upon by Mr. Ronan rested upon a distinction which he drew between the terms "prohibition" and "restriction"

(1) 2 Coke's Inst., p. 61.

(2) 12 Rep. 74; 2 St. Tr. 723.

as used throughout the Customs Acts. He said that the former word, which is that occurring in 43rd section, was confined in its use to orders of a general character extending to the whole United Kingdom or the whole of the British possessions, according to the scope of the particular section in which it occurred ; while the term "restriction" was applied to cases where the restraint on trade was either confined to a particular locality or was subject only to certain conditions being complied with. He referred in detail to many sections in the Customs Acts, from the 6 Geo. 4, c. 107 to the 39 & 40 Vict. c. 36, in support of this view. I cannot, however, see that in these Acts the term "prohibition" is confined in its use to orders of a general and absolute character only. Throughout the Acts both terms are used, as it appears to me, with the general meaning borne by them in the English language. Indeed, in the very first Act which he cites (6 Geo. 4, c. 107) a restraint on importation of a qualified kind, which according to his theory should be treated as a restriction only, is contained in a table of "Goods absolutely prohibited to be imported." That is in sect. 52, where under this heading are included "arms, ammunition, and utensils of war, by way of merchandise, *except by licence from His Majesty, for furnishing His Majesty's public stores only.*" This is not a prohibition at all, but simply a restriction. It is true that in a subsequent list, in the same section, of "Goods subject to certain restrictions on importation," there are included restraints on importation except into particular ports ; but this does not necessarily imply that such restraints are not properly termed "prohibitions." An order may from one point of view be a "prohibition," and from another point of view a "restriction." In reference to the particular locality to which the order applies, it is a "prohibition" ; in reference to the whole United Kingdom, it is a "restriction." I can understand a foreign merchant inquiring, "Is there any restriction on the importation of arms into the United Kingdom ?" and being answered "Yes, there is an absolute prohibition to their being imported into Ireland." Throughout the Acts I cannot see any indication that the two terms "prohibition" and "restriction" are used in any special or technical signification. They appear to me to be used as any person understanding the English language would use them.

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Another argument to which Mr. Campbell seemed to attach particular importance (he called it his sheet-anchor) was based upon the corresponding legislation dealing with exportation. The 138th section of the Act of 1876, for which has now been substituted the 8th section of the Act of 1879 (42 & 43 Vict. c. 21), gave power in general terms to prohibit by proclamation or order in council the exportation of certain goods, including arms, ammunition, and gunpowder. A subsequent Act was passed (63 & 64 Vict. c. 44) giving power to prohibit by proclamation the exportation of "arms, ammunition, military and naval stores" and other articles "to any country or place therein named," whenever Her Majesty shall judge such prohibition to be expedient in order to prevent such arms, ammunition, military or naval stores, being used against Her Majesty's subjects or forces, or against any forces engaged, or which may be engaged, in military or naval operations in co-operation with Her Majesty's forces."

This enactment, it was urged, would have been entirely unnecessary if the construction contended for by the Crown of the 43rd section of the Act of 1876, in the present action, be the correct one; for as the general includes the particular, and the whole includes the part, a power to prohibit exportation generally would include a power to prohibit exportation to any particular place.

All this is quite true, and the argument based upon it is a powerful one. It indicates that the legal advisers of the Crown, when it became expedient to prohibit the exportation of arms to a particular country only, considered it at least doubtful whether the powers conferred by the Act of 1879 were sufficient for the purpose. But the argument cannot be pressed further than this. Very often when there is any doubt as to how far the scope of an Act of Parliament extends, an amending Act is passed, from which it might be implied that the Act amended did not extend to the doubtful region; though on its true construction it would be held to do so. I can quite understand that the executive authorities, even though they were advised by their law officers that the Act of 1879 authorized a proclamation restricting exportation to a particular country, might hesitate to act on that

advice if the matter was in their view in the least doubtful. *K. B. Div.*
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 difficulties may arise, it is essential that the officials should stand on *HUNTER*
 firm ground. Great caution must be used in dealing with the *COLEMAN.*
 subjects of other States; and I can quite understand the law *Cherry,*
 officers recommending further legislation, even though they may *L.C.J.*
 have been of opinion that this legislation was, strictly speaking,
 unnecessary. Even if the law officers formed a definite opinion
 that the new legislation was necessary, such opinion would not
 be binding on this Court, though, of course, we should treat it
 with respect. I cannot, therefore, hold that this legislation
 necessarily implies that the general power to prohibit the impor-
 tation of arms contained in the 43rd section does not authorize
 an order prohibiting such importation into Ireland only.

Similar arguments were based upon the Contagious Diseases
 (Animals) Acts, 1878 to 1893, by which powers were conferred
 on the Board of Agriculture to make orders prohibiting the
 landing of animals "from any specified country out of the
 United Kingdom, or any specified part of any such country."
 The same answer is of course available, that the particularity of
 the powers conferred by the Acts does not necessarily imply that
 more general powers would not have been quite sufficient for the
 purpose. Incidentally I may mention, as bearing on the main
 argument of Mr. Ronan in this case, that in the Contagious
 Diseases (Animals) Acts the term "prohibit" is constantly
 applied to orders of a strictly limited scope as to area. The
 reference to these Acts, therefore, strengthens the view I have
 taken as to the meaning of the word "prohibition" in the Customs
 Acts.

I now come to the argument based upon the Act of Union, and
 strongly relied upon by the plaintiffs. The application of the
 proclamation prohibiting the importation of arms into Ireland
 only, apart from the rest of the United Kingdom, was said to be
 a violation of that Act. The 6th Article of the Union was par-
 ticularly relied upon. It provides that "His Majesty's subjects
 of Great Britain and Ireland shall, from and after the first
 day of January, 1801, be entitled to the same privileges, and be
 on the same footing as to encouragements and bounties on the

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like articles, being the growth, produce, or manufacture of either country respectively, and generally in respect of trade and navigation in all ports and places in the United Kingdom and its dependencies." The argument based upon this Article was only pressed to the extent that the Court ought to adopt a construction of the Customs Acts which would not conflict with it, if the construction of these Acts was at all doubtful, for it was not denied that an Act of Parliament might alter or amend the Act of Union in the same way as any other Act of Parliament.

I do not think that this argument goes any further than the general argument against a power of discrimination being conferred upon the Crown, with which I have already dealt. Such powers may, of course, be abused, but we are not bound to assume that they will be abused. The proclamation in the present case does not really interfere with the trade of Ireland in any way, nor does it confer any trading privileges upon His Majesty's subjects of Great Britain which are not possessed by his Irish subjects. Legislation of a similar restraining character as regards the importation into, and the carrying of arms in, Ireland has frequently been passed by Parliament, without applying to England or Scotland; and I can see no reason for holding that the 43rd section should be restricted in its scope by any fear of an interference with privileges conferred by the Act of Union.

These were, I think, all the arguments which were urged upon us in support of the view that the proclamation of 4th December, 1913, was invalid. I can perceive nothing in them which constrains me to depart from the broad common-sense interpretation of the section which appeared to me at first sight to be the true one.

A power to prohibit in general terms seems to me necessarily to imply a power to define and regulate the scope of the prohibition; and I am, accordingly, of opinion that this proclamation is perfectly legal and valid, and that the defendant here can rely upon it in justification of the acts done by him under it.

But, apart from the question as to the validity of the proclamation, it was argued before us that the plaintiffs were entitled to succeed in the present action because the goods seized had not been condemned as forfeited by a competent tribunal. It was

urged that, inasmuch as the procedure directed by sect. 207 of the Customs Act, 1876, had not been taken, either by information in the High Court of Justice, or by proceedings before a justice of the peace, the property in the goods still remained vested in the plaintiffs, and that they were entitled to judgment on the counts for trover and detinue of the goods. I do not understand why such proceedings were not taken in the present instance by the Customs authorities. They appear to have followed the procedure directed by sect. 207 up to a certain point, and then to have stopped. I think it would have been more regular if the goods had been condemned before they were destroyed; but, the Commissioners not having taken this course, it is necessary for us to consider whether their defence in this action is prejudiced by the omission.

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The Solicitor-General has pointed out to us, in his able argument in reply, that it appears from many of the sections of the Customs Act, 1876, that forfeiture of goods may occur, and does occur, upon committal of an offence under the Act, and before any proceedings are taken either *in rem* or *in personam* to have the goods declared forfeited. The opening words of sect. 207 itself point to this conclusion. "Whenever," it says, "any seizure shall be made, unless in the possession or in the presence of the offender, master, or owner *as forfeited* under the Customs Acts," &c. There the goods are described as *forfeited*, even before seizure. Sect. 177 bears out this view, and clearly indicates that forfeiture takes place upon the importation of the prohibited goods. The same construction must be placed upon sect. 42, which is *in pari materia*, and which clearly enacts that if any goods be imported contrary to its prohibition, "such goods shall be forfeited."

It is further shown that under the 11th sect. of 42 & 43 Vict. c. 21, all questions as to penalties, forfeitures, and the liability to forfeiture may be determined in a civil action in the High Court as well as by proceedings by way of information in the name of the Attorney-General. Consequently if the goods, in the present case, were forfeited by the attempt to import them in violation of the proclamation, the question as to the validity of the forfeiture can be determined in this action; and if we decide that they were

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duly forfeited, plaintiffs cannot succeed in the action. In my opinion they were duly forfeited by the attempt to import, and the plaintiffs are not entitled to rely upon the absence of a formal condemnation as entitling them to succeed in the present action.

It was proved in evidence at the trial that the arms seized had been destroyed by the police shortly after their seizure, and this fact was also relied upon by the plaintiffs as giving them a right of action, whether the proclamation was valid or not. It was urged that the destruction of the goods before condemnation was illegal, and that the Customs officers who seized thereby became trespassers *ab initio*. But if the goods were, as I think they were, duly forfeited at the time of their destruction, there was nothing that I can see illegal in the act of destruction. It may have been a risky course to adopt, as if the Court should decide for any reason that the seizure was illegal, the official who directed or sanctioned the destruction might thereby render himself liable to pay heavy damages, but, in my opinion, where the forfeiture had already been incurred there was no illegality in the destruction of the goods without any formal condemnation of them by any tribunal.

The case of *Scott v. Shearman* (1) was strongly relied upon by the plaintiffs on this branch of their argument. I do not see how that case helps them. It merely decides that the record of condemnation of goods in the Exchequer is conclusive evidence, in a subsequent action *in personam*, that they were properly seized. But it by no means decides that the absence of a formal condemnation implies that there has been no forfeiture.

It was finally urged that inasmuch as the articles seized are not now *in esse*, no declaration can be legally made in this action that they were rightly seized as forfeited. I asked Mr. Campbell had he any authority for that proposition, and he said he had none but common sense. It appears to me, however, to be contrary to common sense, and not in accordance with it.

For all these reasons I am of opinion that the judgment entered by Boyd, J., for the plaintiffs at the trial should be set aside, and judgment entered for the defendant on the claim for damages in the action. On the counter-claim I think that the

defendant is entitled to the declaration prayed for, viz., that the goods, the subject-matter of the action, were duly and regularly seized as having been attempted to be imported in contravention of the proclamation. As the Attorney-General does not press for any judgment on the claim for penalties, no order need be made as to their recovery. The defendant is, I think, entitled to the costs of the trial and new trial motion. As my brother Dodd agrees with me, such will be the order of the Court, though my brother Kenny, I regret to say, dissents from our view for the reasons he has so powerfully and clearly stated in his judgment.

Solicitors for the plaintiffs: *Carson & M'Dowell.*

Solicitor for the defendant: *Sir Malachy Kelly.*

A. E. C.

DOONER v. ODLUM (1).

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Landlord and tenant—Rent—Fee-farm grant—Grantees holding in severalty—Joint and several covenant by grantees to pay entire rent—Liability of assignee of one of grantees—Covenant running with the land—Privity of estate.

April 28, 29
May 14.

A fee-farm grant made under the Renewable Leasehold Conversion Act to several persons contained a joint and several covenant on the part of the grantees to pay the entire rent reserved by the grant. As between themselves the grantees held their respective shares of the lands in severalty, each paying an apportioned part of the rent. All the estate and interest of one of the grantees in the lands subsequently became vested in the defendant. An action having been brought against the defendant as such assignee to recover the entire rent:

Held, that the defendant was liable only for such proportion of the rent as was applicable to the share of the lands which had become vested in her.

MOTION for judgment or a new trial.

The plaintiffs' claim was for £38 16s., being one year's rent payable out of certain lands situated in King's County, and the action was tried before Mr. Justice Dodd, without a jury, on February 13th and 24th, 1914, when the following matters were proved or admitted:—

On the 1st May, 1706, a lease for lives renewable for ever of

(1) Before CHERRY, L.C.J., and KENNY, J.

K. B. Div. part of the lands of Kilcooney was made by one Philip De Lisle to
 1914. — one William Low. By divers mesne assignments, the lessor's
DOONER interest had become vested on the 10th October, 1835, in three
v. persons—William Speer, Charlotte Dooner, and Jane Dooner;
ODLUM. while the lessee's interest was split up amongst James Dunne, Edward John Odlum, Catherine Odlum, Mary Anne Augusta Pilkington, John Drought, and Mary Drought.

On September 29th, 1859, the lease was converted into a fee-farm grant, under the Renewable Leasehold Conversion Act, at a rent of £75 13s. 10d. Portions of the lands were sold to the occupying tenants under the Land Purchase Acts; and, the superior rent having been apportioned and in part redeemed, there remained payable out of the unsold lands an annual rent of £38 16s. The parties to the fee-farm grant included seven grantors and nine grantees, among the latter being one Mabella Odlum. By the fee-farm grant Mabella Odlum and the other grantees covenanted for themselves, their heirs, executors, administrators, and assigns, that they "the several covenanting parties, or some or one of them, their or some or one of their heirs, executors, administrators, or assigns, shall and will from time to time, and at all times thereafter well and truly satisfy and pay to the . . . parties . . . of the first part, their heirs and assigns, the above reserved rent and every part thereof."

The plaintiffs, William Toke Dooner and Adelaide Dooner, were the assignees of the grantors. All the estate and interest of Mabella Odlum in the lands had become vested in the defendant, Elizabeth Odlum, and she was now sued upon the covenant as assignee of Mabella Odlum for the entire rent of £38 16s. payable out of the unsold lands.

The defendant, in her evidence, stated that she had been in exclusive possession since 1877 of all that part of the lands which had been held by Mabella Odlum, and that she and her predecessors had paid for the lands only £6 9s. 4d., their share of the rent as apportioned by the grantees amongst themselves. Mabella Odlum was her husband's mother. She died in 1872. Her husband was in possession after his mother's death, and she had been in exclusive possession since her husband's death. She had the lands sub-let, and her tenants paid the rent to her.

Mr. Justice Dodd held that the rent was divisible; that there

was absolutely no evidence and no presumption upon which to find an inference that the defendant held an undivided share in the lands, jointly or as tenant in common, in the ordinary sense of the term. He found that the plaintiffs were not entitled to the full sum claimed in the writ, but were entitled to £6 9s. 4d., being the sum payable by the defendant to the plaintiffs for rentcharge for a divided share of the lands in the possession of the defendant. He apportioned the rent as between the plaintiffs and the defendants upon the same basis as the grantees among themselves had apportioned it, at £6 9s. 4d. As the defendant had tendered the sum of £6 9s. 4d. before action brought, the learned judge gave judgment for the defendant with costs. He delivered the following judgment:—

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Dodd, J.:—

The action is brought by the assignees of a lessor against an assignee of a lessee, and is deliberately framed in covenant. The defendant does not challenge the plaintiffs' title. Her case is that she is in possession of a divided part of the lands. She is willing to pay her proportion of the rent; but she says she is not liable to the entire rent.

It appears that a lease for lives renewable was made by one Philip De Lisle to one William Low of part of the lands of Kilcooney, in King's County, on the 1st May, 1706, at a rent therein reserved. By divers mesne assignments the lessor's interest got vested, on the 10th October, 1835, in three persons—William Speer, Charlotte Dooner, and Jane Dooner—the lessee's interest being split up among James Dunne, Edward John Odlum, Catherine Odlum, Mary Ann Augusta Pilkington (devises of Mary Pilkington, deceased), John Drought, and Mary Drought. A renewal of the lease was then granted, and in that lease there was a covenant by the lessees, each covenanting for himself or herself, their heirs and assigns, to pay the entire rent.

On the 29th September, 1859, the lease was converted into a fee-farm grant under the Act, the rent being £75 13s. 10d. There were seven grantors, among the grantees being Mabella Odlum. There was a covenant in that grant by each of the nine

K. B. Div. grantees, Mabella Odlum being one. She covenanted for herself,
 1914. her heirs and assigns, to pay the entire rent.

DOONER The grantors' interest in that grant is now vested in the
 v. plaintiffs, and it is admitted that the entire of the interest of
 ODLUM. Mabella Odlum in the lands is now vested in the defendant.
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By an order of the Irish Land Commission portion of the lands comprised in the lease and fee-farm grant have been segregated, being portion vested in Terence J. B. Dunne and others. The rent has been apportioned at £37 16s. 11*d.*, leaving £38 16s. payable in respect of the rest of the lands; and the £37 16s. 11*d.* has been redeemed. It would seem that the fee-farm grant was a sub-grant, and the higher interest was also redeemed.

Under these circumstances the plaintiffs sue the defendant for the entire of the rent of £38 16s. They sue, not on the personal covenant made by Mabella Odlum; they sue deliberately on the ground that "the estate and interest of Mabella Odlum is now vested in the defendant as assignee thereof, and she is now in possession or receipt of the rents and profits thereof."

The question for decision is, Can the assignee of the grantor sue the assignee of the grantee under the circumstances set forth?

Nothing turns upon the rent being a fee-farm rent. It has been assumed that a covenant to pay the rent-charge runs with the land, and binds an assignee, and is enforceable by an assignee of the grantor. Mr. White seems to think it is in his favour that the lease is now converted into a fee-farm grant. So far as I am concerned, it would seem to be rather against him: see the judgment of my brother Gibson in *Bell v. Belfast Corporation* (1). But, as I have said, nothing turns upon that. The simple question is, Can the assignee of the reversion, under the circumstances, sue the defendant for the entire rent, it being assumed that the covenant runs with the land?

Before deciding the one question of fact which calls for adjudication, I think it better to state my view of the question whether the facts in this case bring it within one set of authorities or another.

The law, I think, is clear enough. Some misapprehension is caused by a misapplication of a statement by Mr. Foa, in his

(1) [1914] 2 I.R. 1.

book, at p. 417:—"Whether an assignment by the lessee of his whole interest in *part* of the demised premises (an act by which he is said to 'sever' the term) creates a privity of estate between the lessor and assignee in respect of the whole seems doubtful." I do not agree with the learned author. I think upon the authorities it is not doubtful. But the doubt suggested is, not as relied upon in argument before me, but as to whether the assignee can, under such circumstances, be sued at all, even for a *part* of the rent.

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The authorities, I think, make it clear, 1, that he cannot be sued for the whole rent; and, 2, that he can be sued for part. The decisions, in later times, have got involved in technical matters of pleading, which can, however, by a little care be disentangled, leaving the propositions I have mentioned clearly decided.

The first two authorities are not encumbered with any such entanglement. All the others are.

In *Congham v. King* (1) it is decided that *covenant* will lie against the assignee of part of the land for not repairing *his part*, for it is divisible, and follows the land, with which the defendant, as assignee, is chargeable by the common law, or by the statute 32 Hen. 8, c. 37.

In *Gamon v. Vernon* (2) the lessor had assigned the moiety of the land for the whole term. The lessor brought *debt* against the assignee for the moiety of the rent. The argument for the defendant was that he was not liable for any portion of the rent; that both the privity of estate and privity of contract remained entirely in the lessee; and, by consequence, the moiety of the assignee was not chargeable. But the Court held that the assignee, having the entire estate in one moiety of the land, had *privity of estate* sufficient to be charged by the lessor for the moiety of the rent, if he will (*s'il veut*). The *s'il veut* is relied on as showing that the plaintiff had sued for something less than the Court could have given him. That is erroneous. The lessor might have sued the lessee for the whole rent on privity of contract. But, if he will, he may sue the assignee for the one-half, by reason of the privity of estate, which he had.

The case of *Stevenson v. Lambard* (3) makes that quite clear.

(1) Cro. Car. 221.

(3) 2 East, 575.

(2) 2 Levinz, 231.

K. B. Div. It was an action of covenant, and it was held that an action of
 1914. covenant lies against the assignee of a lessee of an estate for part
 DOONER of the rent, as, in such cases, the assignee is chargeable on the
 v. privity of estate, and in respect of the land. His rent is, upon
 ODLUM. principle, apportionable as his rent would be in an action for
 Dodd, J. debt. In that case the declaration was for the whole rent. The
 plea set forth facts showing that the assignee had been evicted
 from one moiety by title paramount. On demurrer the argument
 was that, as the rent could not be apportioned, the action did not
 lie. Judgment was given for the plaintiff, with leave to the
 defendant to amend his plea, and to plead it to the one moiety of
 the rent.

The other cases are pleading cases. In *Hare v. Cator* (1) the
 defendant was charged as assignee of the whole. The plaintiff
 having shown him to be assignee of the part was non-suited. He
 could not have been non-suited if the assignment of part made
 him liable for the whole rent. The defendant got judgment.

That case came up for consideration in *Curtis v. Spitty* (2),
 where, again, the pleading determined the result. It was held
 that evidence that the defendant was assignee of part only of
 the demised premises did not sustain an allegation that he was
 assignee of the whole.

In *Heap v. Livingston* (3) the pleadings again determined
 the result. The action was brought against the defendants as
 assignees of a lease. The defendants pleaded in abatement that
 they were joint assignees with another person, B., who was not
 named a defendant. There was a special demurrer to this, on
 the ground that the defendants did not state their title specially.
 The argument conceded that it was a bad plea in abatement;
 but counsel fell back upon its being a good plea in bar. But the
 decision was that the defendant did not take *part* of the estate.
 He was, as admitted by the plea, a joint tenant of the whole. In
 our modern procedure a special demurrer would be a motion to
 set aside as embarrassing, and the plea in abatement would be
 represented by our practice as to non-joinder of parties.

(1) Cowp. 766.

(3) 11 M. & W. 896.

(2) 1 Bing. N. C. 756.

Merceron v. Dowson (1) is another pleading case. The action was for premises being out of repair. The declaration was in the general form:—"All the estate and interest of the lessee came to and vested in the defendant by assignment." Plea, that the defendant was possessed of one-sixth of the premises as tenant in common with A, B, and C, and for another period of one-third as tenant in common with B and C, and no greater interest. Demurrer thereon. The Court held the plea bad in substance as well as in form. In giving judgment Bayley, J., said:—"There are many cases showing that the assignee of part is liable to be charged for that part. This case is somewhat different, for the defendant has no entire interest in any part, but a particular interest in the whole." Holroyd, J.:—"If it had been pleaded to all, save for one period, one-sixth, and, for another period, one-third, it might have raised a very different question from that which is now presented to us."

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Littledale, J., pointed out that the ground of defence set forth in the plea is, that the whole of the premises did not come to the defendant by assignment. That was bad. But he goes on: "Either debt or covenant will lie for rent against the assignee of a part of an estate, according to *Gamon v. Vernon* (2); and, if debt or covenant will lie against an assignee of a part for rent, I see no reason why covenant should not lie for a portion of the damages sustained by the want of repairs."

Both pleadings and law received full consideration in *Shee v. Gray* (3). There were two counts. One against the defendant as assignee in the general form "all the estate and interest," &c.; the second setting out a paper title in the defendant showing he was assignee. One of the steps of the title so derived was that the lessee had devised his property to his widow for life with power of appointment among his three daughters, and averring that an appointment under the power had been made to the defendant by the widow of the lessee. The defendant traversed the averment in the first count, and, as to the second, pleaded that the widow had not exercised the power of appointment as alleged.

(1) 5 B. & C. 479.

(3) 15 I. C. L. R. 296.

(2) 2 Levinz, 231.

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K. B. Div. The plaintiff failed to prove that any appointment had been made, but he gave evidence of exclusive possession of the entire premises by the defendant. If the power had not been exercised, it would seem that the three daughters took as tenants in common. The case was tried by Mr. Justice Christian, who directed for the defendant, on the ground that the plaintiff, having tried to prove a title and failed, could not rely on evidence of possession; secondly, assuming that the acts of ownership showed exclusive possession by the defendant, the period of four years over which they extended was not sufficient in law to found the presumption of the due execution of the power; thirdly, that the evidence did not prove exclusive possession by the defendant, but was as consistent with the non-existence as with the existence of a deed executing the power. Monahan, C.J., was of opinion that the evidence of possession was sufficient to support the second count; but the other judges did not make that a ground for their decision. They concurred with the Chief Justice in holding: first, that the evidence of possession was sufficient to sustain the first count; secondly, that assuming that the plaintiff could not recover on the second count by reason of his having failed to prove one of the averments in it, viz., a due execution of the power, he should not be precluded from recovering on the first count; and, thirdly, that assuming that the defendant was tenant in common with her two sisters, that could not be relied on under the traverse to the first count, but must be pleaded in abatement. The case is an extremely interesting one as illustrating the different points of view of the two eminent judges, Chief Justice Monahan and Mr. Justice Christian. But it is not necessary to pursue the matter further.

The concluding case is *Orme v. Wills* (1). The defendant was sued for the entire rent. He pleaded that all the estate and interest of the lessee did not vest in the defendant. The lessee was Henry Wills. The lease was dated 28th August, 1855, of a farm of 32 acres, 8 acres meadow land, 24 acres uplands and coarse bottom pasture. Shortly after the lease, Henry Wills put his son-in-law, Thomas O'Flynn, in possession of one half of the farm as

under-tenant paying rent to the lessee. Wills and O'Flynn occupied the 8 acres of meadow in separate divided moieties. The residue of the farm they grazed in common. By his will Henry Wills left the farm as follows:—"I also leave to my son-in-law, Thomas O'Flynn, half Curradrish, he paying half the rent and taxes for it, and the other half *as I hold myself* I leave to my son Thomas." The Court held that the effect of the will was to vest in O'Flynn and Thomas Wills *separate divided interests* in the meadow, and an *undivided estate or interest as tenants in common in the pasture land.*

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The Chief Justice says:—"It appears to be established that, if a lease has vested in several persons as tenants in common and any one or more of them (less than the whole number) are sued in covenant for the rent, if there be an averment that the entire interest is vested in the defendant or defendants, and that averment is traversed by a plea in bar of the action, the issue so joined must be found against the defendants. On the other hand, if the demised premises become vested in several persons in separate divided portions, and one of the assignees in part be personally sued for the rent reserved, if there be an averment that the whole interest of the lessees has vested in the defendants, and this averment is traversed, it is decided, in the case of *Curtis v. Spitty* (1), that the issue so joined must be found for the defendant."

In that case, Mr. Justice Barry, at the trial, was willing to allow the plaintiff to amend, but the plaintiff declined. Mr. Justice O'Brien concurred on the authority of *Curtis v. Spitty* (1). The judgment of the dissentient judge, Mr. Justice Fitzgerald, is not in conflict with the doctrine that an assignee of a divided part is liable only for a portion. He is courageous enough to hold that a traverse of the kind referred to may be interpreted that the defendant is not assignee of the whole estate *or of any portion of it which would make him liable to the plaintiff.* "It is not," he goes on, "a question of abatement, or of the joinder of the parties as defendants; for it is plain that the plaintiff could not by an allegation in any one action, save ejectment, have enforced his whole rent." The dissentient judge is more against Mr. White's contention than the others.

(1) 1 Bing. N. C. 756.

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The case was reversed on appeal, but on what grounds does not appear. Mr. De Versan has been good enough to show me the note of the judgment. The judgment was for the whole rent, and I infer the Court held that there was no real severance in fact, and that the cases cited did not apply. Lord Justice Christian apparently adhered to his former opinion.

Mr. White contends that I should hold here that the defendant is not in possession of a divided part, but the facts are all against him. The original lease was made by one person to one person in 1706, by Philip de Lisle to William Low. The lessee's interest has been split up into at least six different portions. The defendant was examined before me, and proved that she had been in possession since 1877 of part of the lands of Kilcooney, included in the lease and grant. She has it sublet, and her tenants pay the rent to her. She has been paying rent since 1877 (£6 9s. 4d.), her proportion of the head-rent. She puts in a receipt from Spiers to Odlum for £3 4s. 8d., dated 24th January, 1878. She said Mabella Odlum was her husband's mother. She died in 1872. Her husband was in possession after her death; she had been in exclusive possession since her husband's death. In answer to Mr. White, she said she understood she had all that Mabella Odlum had.

Mr. White contended that the facts of this case brought it within the authority of *Merceron v. Dowson* (1) and not of *Curtis v. Spitty* (2) and *Orme v. Wills* (3). Some of the receipts for rent were from Mr. French, agent for the Dunnes. They were for "proportion of head rent." I thought these were evidence against there being an undivided share in one common estate, and were more consistent with exclusive possession of a divided part. He admitted that if Mabella had not assigned all her estate to the defendant's predecessor he could only recover a portion of the rent, the portion to bear the same proportion to the entire rent as the portion assigned bore to Mabella Odlum's interest. If one-fifth was assigned, the assignee of Mabella would be liable for one-fifth of the entire rent. I can find no suggestion of any such

(1) 5 B. & C. 479.

(3) 2 L. R. Ir. 124.

(2) 1 Bing. N. C. 756.

doctrine in any case or text-book. A large portion of the property has been completely severed and the head-rent apportioned by an order of the Land Commission. Mr. White strenuously relied on the fee-farm grant having created the parties joint tenants, and on the covenant by each grantee to pay the entire rent. The grantees in the fee-farm grant were not tenants at all, whether joint tenants, or tenants in common. They were owners in fee subject to a rentcharge. The rent expressed to be reserved was, in contemplation of law, not a rent-service but a rentcharge, and an assignment of part creates a privity of estate in respect of the part for which the grantor can sue the part: see *Ireland v. Landy* (1). I do not say that Mabella Odlum could not have been sued upon her personal covenant in the fee-farm grant, nor that her personal representatives might not be sued. The action here is not on any such privity of contract. It is based upon the privity of estate against the defendant, who is sued as assignee. No evidence of assignment is given other than the presumption that arises from possession. The rent, according to the authorities I have cited, is divisible. There is absolutely no evidence and no presumption upon which to found an inference that she holds an undivided share in the lands jointly or as tenant in common, in the ordinary sense of the term, with others. In one sense, of course, it may be contended that a number of tenants, each holding a divided portion and each contributing to the entire rent, are tenants in common. Baron Fitzgerald suggests co-tenants. Lord Hatherley puts it that they make a conjunct tenant: *Liddy v. Kennedy* (2). But the authorities recognize a *divided share*, and the inference here is overwhelming that it is a *divided share* the defendant holds.

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Mr. White contends that the grantor is not bound by the apportionment made between the grantees. I think that is so. But I have sufficient *prima facie* evidence that the apportionment is just; and, in the absence of any evidence to the contrary, I find for that amount £6 9s. 4d.; and the defendant having tendered that sum before action, and having lodged it in Court, I give judgment for the defendant with costs.

(1) 22 L. R. I. 493.

(2) L. R. 5 H. L. 134.

K. B. Div. The plaintiffs now moved for judgment for the amount sued for, or alternatively for a new trial.

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H. D. Conner, K.C. (with him *R. Grove White*), for the plaintiff:—

The covenant to pay the entire rent runs with the land, and the defendant, as assignee of one of the original grantees and covenantors, is now liable for payment of the entire, though we admit that if one of the grantees had split up his or her share the assignees of a portion acquired in that way could not be made liable for the entire rent. If a lessee covenanted for himself and his assigns to do something upon the land demised, the assignee was, according to the common law, bound by the covenant, which ran with the land but not with the reversion: *Spencer's Case* (1). By 10 Car. 1, Sess. 2, c. 4 (Irish), following 32 Henry 8, c. 34, in England, assignees of the reversion were given the like remedies against lessees and their assigns as lessors had; and these provisions were subsequently embodied in the Landlord and Tenant (Ireland) Act, 1860, sects. 12 and 13. The assignees of the landlord are, therefore, in the same position in regard to the terms of the contract as the original lessor. A conclusive authority in our favour is *Norval v. Pascoe* (2), in which it was held that the assignee of some of the joint tenants of a term, where the covenant was joint and several, was liable on a covenant to pay the whole of the compensation due to the grantor of a mining lease. *Orme v. Wills* (3) is also a strong authority in our favour. The assignee of the reversion in part of the lands is an assignee within the meaning of the statute of Charles I: *Simpson v. Clayton* (4). A covenant by a lessee affecting the user of the demised premises will run with the land, although the act to which the covenant relates is to be done on land of the lessor outside the limits of the demised premises: *Sampson v. Easterby* (5). A covenant to repair a sea wall not included in the demised premises has been held to run with the land and to bind an assignee of the lessee: *Lyle v. Smith* (6).

(1) 1 Sm. L. C., 11th ed., at p. 62.

(2) 34 L. J. Ch. 82.

(3) 2 L. R. Ir. 124.

(4) 4 Bing. N. C. 758.

(5) 9 B. & C. 505.

(6) [1909] 2 I. R. 58.

Fitz Gibbon, K.C., and F. W. Price, for the defendant :—

The effect of the grant of 1859 was to put the entire fee in the nine grantees as joint tenants or tenants in common in respect of the whole land, and the covenant to pay the entire rent became annexed to that estate. The effect of the Renewable Leasehold Conversion Act, 1849 (12 & 13 Vict. c. 105), sect. 7, was to redistribute that estate, in severalty, amongst the grantees according to their respective interests in the same. On the true construction of the Act, the moment the fee-farm grant was executed the entire estate in the fee, which momentarily passed to the grantee, became vested forthwith in the persons who were, just before its execution, respectively entitled to the interests or estates under the lease for lives renewable for ever, according as these interests or estates had then been legal or equitable: *Watson v. Watson* (1), at p. 531. Whatever lands Mabella Odlum occupied in severalty are now occupied by the defendant; and the latter, as assignee, cannot be held liable for more than an apportioned part of the entire rent: *Salts v. Battersby* (2); see also *Ireland v. Landy* (3). To succeed against the defendant the plaintiffs must show that she has got the entire estate given by the grantor or covenantor; but here the privity of estate necessary to support a claim against the assignee to the entire rent does not exist. An action of covenant against an assignee differs essentially from a mere covenant personal; it is in such a case properly a real contract in respect of the land: *Stevenson v. Lambard* (4), at p. 579; and it is maintainable only upon the privity of estate: *Barker v. Damer* (5). A covenant by Mabella Odlum to pay the rent not only of her own portion of the lands but of the portions of the other grantees could not run with the lands so as to bind her assignee, because such a covenant would be collateral to estates not included in the demise to her: *Gower v. The Postmaster-General* (6). In order to run with the land the covenant must touch the thing demised itself: *Dewar v. Goodman* (7). In *Sampson v. Easterby* (8) the mill in respect of which the action was brought

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(1) 1 I. R. 11 Eq. 523.

(2) [1910] 2 K. B. 155.

(3) 22 L. R. Ir., at p. 417.

(4) 2 East, 575.

(5) Carth. 182.

(6) 57 L. T. (N. S.) 527.

(7) [1909] A. C. 72.

(8) 9 B. & C. 505.

K. B. Div. 1914. was included in the demised premises. In *Lyle v. Smith* (1) the covenant affected the demised premises themselves. As to *Orme v. DOONER v. ODLUM.* *Wills* (2), judgment for the entire rent must have been given in the Court of Appeal on the ground that there never had been a severance in fact. In the Court below May, C.J., laid down that if the demised premises became vested in several persons in separate divided portions, one of these assignees of part cannot be personally sued for the whole rent. He is only liable for the rent of the portion vested in him. In *Cherry's Land Acts*, 3rd ed., p. 41, it is stated that "there appears to be no reason to question the law as laid down by May, C.J., in the Court below." *Norval v. Pascoe* (3) is no authority directly or at all ruling this case.

White, in reply, cited *M'Naul's Estate* (4); *Abbot's Estate* (5); and *Platt on Covenants*, p. 66.

Cur. adv. vult.

May 14.

CHERRY, L. C. J. :—

This is an action brought to recover a sum of £38 16s., being one year's rent of certain lands situated in the King's County, held under a fee-farm grant dated the 29th September, 1859. The rent originally reserved by the fee-farm grant was £75 13s. 10d., but portion of the lands have been sold to the tenants thereof under the Land Purchase Acts, and the rent now sued for represents the entire amount apportioned on, and now payable out of, the residue of the lands remaining unsold. The defendant is sued as assignee of *Mabella Odlum*, who was one of nine grantees in the fee-farm grant, and it is expressly admitted that all the interest in the premises formerly vested in *Mabella Odlum* is now vested in her.

The lands were originally demised under a lease for lives renewable for ever dated May 1st, 1706; and this lease was from time to time renewed pursuant to the covenant for renewal therein contained, the last renewal thereof having been made on the 10th October, 1835. It appears that while this lease was current, or at all events at some time prior to the execution of the fee-farm

(1) [1909] 2 I. R. 58.

(2) 2 L. R. Ir. 124.

(3) 34 L. J. Ch. 82.

(4) [1902] 1 I. R. 114.

(5) I. R. 11 Eq. 268.

grant, the lessees, who were, of course, joint tenants as regards the landlords, made for their own convenience a partition of the lands among themselves, and Mabella Odlum was, prior to the date of the fee-farm grant, in exclusive occupation of a portion of the demised premises, paying as her share of the rent the yearly sum of £6 9s. 4d. This sum was not at any time paid direct to the landlord, but was collected from her by one of her co-lessees who himself paid the entire rent each gale day, collecting from the other lessees their respective shares. By the fee-farm grant of 1859, Mabella Odlum, though only in physical possession of portion of the premises, entered, with her co-grantees, into a joint and several covenant with the grantors to pay the entire rent reserved by the grant, and it is upon this covenant that the defendant is now sued. There has been no further partition of the lands since the date of the fee-farm grant. The defendant has vested in her all the estate and interest of Mabella Odlum in the lands, and occupies in severalty exactly the same lands as Mabella Odlum formerly held. She has tendered before action brought the sum of £6 9s. 4d. as her apportioned part of the rent, and the learned judge who tried the case has held that tender sufficient, and has given judgment in her favour. The plaintiffs now seek to set aside that judgment, and to have judgment entered for them for the full year's rent now payable in respect of all the lands now held under the fee-farm grant.

The law is, I think, well settled that where a lessee of demised premises assigns portion of these premises to a stranger, the assignee is liable to the lessor upon the covenants contained in the lease only in so far as those covenants affect the lands in his possession; and, as regards rent, only for an apportioned part of the rent properly chargeable in respect of the lands actually vested in him. This is established by a long line of authorities, cited by Dodd, J., in his learned and elaborate judgment, from *Congham v. King* (1), down to the recent case of *Salts v. Battersby* (2), in which it was held that the rent in such cases should be apportioned in proportion to the respective values of the lands assigned and those retained by the lessee. It is not

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(1) Cro. Car. 221.

(2) [1910] 2 K. B. 155.

K. B. Div. necessary for me to refer at any length to these authorities, as
 1914. Mr. Conner, for the plaintiffs, expressly admitted the law to be as
 DOONER I have stated it. His contention, however, is that it does not
 v. apply to the present case, because there has been no partition of
 ODLUM. the lands since the execution of the fee-farm grant. He argues
 Cherry, that, inasmuch as Mabella Odlum had vested in her the same
 L.C.J. estate in the lands as is now vested in the defendant, and occupied
 in severalty the same portion of the premises, her covenant to
 pay the entire rent reserved by the fee-farm grant runs with her
 share in the lands, and is now binding on the defendant.

In considering this argument it is necessary to bear in mind that the liability of an assignee to pay the rent, which the original lessee has covenanted to pay, arises, not from privity of contract, but from privity of estate. It is not because the lessee has entered into the covenant with the lessor, but because he has vested in him the lands which are charged with the rent, that the assignee becomes liable. The covenant to pay the rent, in addition to the personal liability which it imposes upon the lessee who enters into it, also affixes upon the land itself a liability to pay. This liability is distributed over the lands in proportion to the value of each part; and each assignee is liable only, in my opinion, in proportion to the value of the lands vested in him. I do not think that there is any difference in principle between the cases where the partition of the lands takes place after the covenant has been entered into, and where, as here, it was prior to that date.

The argument that the assignee of part of the premises is liable for the entire rent because the assignor, being in possession only of the same part, has covenanted to pay the whole rent, assumes that there is a transfer of liability from the assignor to the assignee. But there is no such transfer. There is the creation of a new liability in the assignee proportional to the interest vested in him, but the original liability of the assignor, who has entered into the covenant, remains intact and unaffected by the assignment (unless of course there is a clause against alienation in the lease, when different considerations arise). The lessor or grantor can sue the person who has covenanted with him to the full extent of the covenant, and he can sue the assignee to the extent of the estate vested in him by the assignment.

Plaintiff's counsel urged that it was a hardship upon the grantor to be compelled to look for his rent in apportioned parts from a number of assignees in possession of different parts of the premises; but the answer to this argument is that he is not deprived of any right which he possessed under his deed. His remedy against assignees is an additional remedy conferred on him by law where the covenant runs with the land, and he cannot complain if this additional remedy is not as complete as that which he stipulated for in his deed as against the lessee, and which he still retains. The plaintiffs, in this case, if they think right, can proceed against Mabella Odlum, or her representatives if she is dead, for the entire rent now payable under the fee-farm grant; but if they prefer to proceed against her assignee, they can only recover what is properly payable in respect of the portion of the premises now vested in her. This amount has been tendered and refused, and I think therefore that the judgment of Dodd, J., for the defendant was right, and should be affirmed.

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KENNY, J.:—

We have been told at the Bar that the question in this case is one uncovered by authority, and certainly no case has been cited in the course of the argument which specifically deals with the point we have to determine. But although that be so, it seems to me that some of the authorities come very near it, or at least contain the enunciation of principles which leave no doubt in my mind that we should not disturb the judgment given at the trial.

The question is simply this. The fee-farm grant of 1859, made pursuant to the Renewable Leasehold Conversion Act, conveyed certain lands unto and to the use of a number of grantees, including one Mabella Odlum, their heirs and assigns, "according to their several and respective estates and interests therein," subject to the payment of a yearly fee-farm rent; and the grantees thereby jointly and severally covenanted for payment of that rent. As between themselves the grantees since, at least, 1877, and probably at the date of the fee-farm grant, held their respective shares of the lands in severalty. One of these shares, which was vested in the grantee Mabella Odlum, subsequently under certain dispositions became vested in the defendant, who

K. B. Div. 1914. is now sued in covenant for the entire rent, or, to be more correct, for the entire *residue* of the original rent which remains payable since certain redemption orders were made by the Land Commission. *Dooner v. Odlum.* *Dodd, J.*, who tried the action without a jury, held that the defendant was liable only in respect of a proportion of the said rent applicable to the share of the lands that had become vested in her; and the question is whether the plaintiff as owner of the estate of the grantor and covenantee is entitled to recover the whole of the rent (after redemption of part) comprised in the covenant.

This is not a case in which, by an act of a single grantee, the latter's interest has been split up and the assignee of a portion sought to be made liable for the entire rent. It is admitted that in such a state of circumstances the assignee of a share would be liable only for an apportioned part. The case is one in which the defendant represents the entire estate of one of several grantees, as that estate existed at the date of the covenant, and the defendant's contention is that, inasmuch as that estate is held in severalty, she cannot, as assignee of it, be subject to any greater liability for rent than in respect of an apportioned part. The argument has mainly dealt with the questions of covenants running with the land, and privity of estate, but I do not think that Mr. Fitz Gibbon left out of consideration that the case might be fairly put of the grantees in the deed of 1859 constituting what Palles, C.B., in *Ireland v. Landy* (1)—adopting an expression of Lord Hatherley in *Liddy v. Kennedy* (2)—called a “conjunct” tenant, and of a splitting up of their “conjunct” interest by an act of one of them, whereby the assignee would come into that category to which I have referred, wherein admittedly the liability would be only for an apportioned part of the rent. I pass by that argument, and deal only with that based on covenants touching and concerning and passing with the land, and on privity of estate.

One view of the position admits of no doubt. The original grantee, who covenanted in 1859 to pay the whole rent, was liable on that covenant to its full extent during her life, and on her

(1) 22 L. R. Ir., at 417.

(2) L. R. 5 H. L., at 144.

death her personal representative became equally liable, at least to the extent of her assets. But did the defendant, as the grantee's "real" representative, become liable? A covenant to pay rent is necessarily one that runs with the land out of which it is payable, and the liability on foot of it is ordinarily transmitted to the person who fills the position of assignee of that land. So that the character of this covenant, as being one that may run with the land, is not in dispute. The contention is that it does so in the present case only in a limited way, namely, only to the extent of an apportioned part, inasmuch as the privity of estate necessary to support a claim to the entire is absent. As against that contention two important cases have been referred to, namely, *Norval v. Pascoe* (1), and *Orme v. Wills* (2). The former is claimed as a conclusive authority for recovery of the entire rent. There, the instrument containing the covenant was a mining lease, and the defendant was the assignee of two out of the three grantees who had entered into a joint and several covenant which unquestionably was one that ran with the land. The reasoning of the learned Vice-Chancellor Kindersley in giving judgment in favour of the claimant, Lord Clinton, is not quite easy to follow. He seems to base it on the facts that the original tenancy was a joint one which had been severed by the assignment—that the defendant was working the *entire* of the mine—and that he was liable "in the interests of those who had covenanted severally." If the basis of the decision was that the defendant, by reason of his occupation of the mine, was the substantial assignee of the whole estate, I could understand it, but I feel quite unable to follow the reasoning which suggests a particular conclusion of law in the interests of third parties. It is, however, only right to say that the words as to those third-party interests do not appear in the report of the case in 10 L. T. (N. S.) 809. I think that case is one depending on its particular circumstances, and cannot be regarded as a conclusive authority for the plaintiff here. *Orme v. Wills* (2), and others of the same class, largely turned upon pleading points. The defendant in *Orme v. Wills* (2) was sued as assignee of the entire of the lessee's estate, but was able to establish at the trial that he was assignee only of a part—and

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(1) 34 L. J. Ch. 82.

(2) 2 L. R. Ir. 124.

K. B. Div. that part a divided part. The majority of the Court held, on the 1914.
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Kenny, J. authority of *Curtis v. Spitty* (1), that, having pleaded that he was not assignee, the formal issue on that plea should be found in his favour. The dissenting judgment of Fitzgerald, J., suggests that the defendant should have put forward his defence according to the truth, and should have admitted liability to a proportion of the rent, for which amount the learned judge considered the plaintiff was entitled to a verdict. The decision of the Court was reversed on appeal, and, as appears from the Registrar's note, judgment was entered for the *full* sum sued for. The case is unreported on appeal, and there are no means of ascertaining the grounds of reversal; but it may be that the Court came to the conclusion that in the circumstances of the title the defendant should (as was argued for the plaintiff) be regarded as assignee of the entire of the lands, and consequently liable for the entire rent. It is not to be forgotten that at the trial, while offering liberty to amend, Barry, J., entered a verdict for the plaintiff for the whole rent, though he was afterwards one of the majority in the Queen's Bench who decided that the plaintiff was not entitled to recover at all.

But, while many of those cases turned on points of pleading, it will be found that throughout all of them the principle was recognized that, in order to free the assignee of part of the lands from payment of the entire rent, he must hold the part in physical severalty. When he does so there is no privity of estate, as between him and the reversioner, in the *entire* of the lands. If the share be not held in severalty—whether it be held jointly or in common with others—he is owner with those others of the whole estate, and would be liable accordingly for the whole rent. The judgments in *Shee v. Gray* (2), *Grattan v. Wall* (3), and *Orme v. Wills* (4), I think, support those propositions. The determination of the assignee's liability depends on privity of estate, and I am unable to draw a distinction between a case where the act of severance is that of the covenantor and a case where the severance had taken place before the covenant was

(1) 1 Bing. N. C. 756.

(2) 15 I. C. L. R. 296.

(3) I. R. 2 C. L. 485.

(4) 2 I. R. Ir. 124.

entered into. In neither case is there full privity of estate, and therefore, there is no liability on the part of the assignee for the whole rent.

In the case before us Dodd, J., has found as a fact that the share of Mabella Odlum, which is now vested in the defendant, was a "*divided* part of the lands in the possession of the defendant as assignee of the part," and I therefore concur in the opinion that the defendant is liable only for the apportioned part of the rent.

There is one other aspect of the case well worthy of consideration, though, having regard to the other grounds on which I base my decision, there is no necessity to offer an opinion with reference to it. The rent reserved by the fee-farm grant might be regarded as composed of several parts payable in respect of each of the shares of the grantees, with a covenant by each not only to pay his own share but also the shares of the others. I think it very arguable whether the obligation to pay the latter is thrown on an assignee of that particular share as "*passing with the land*," or whether such a covenant should not be regarded as *pro tanto* collateral to the particular share of the lands vested in the assignee.

The net result of my conclusions is that inasmuch as the defendant's share of the land is held in severalty there is no privity of estate between her and the plaintiff sufficient to support a claim to the full amount of the rent; that there is privity of estate limited to the defendant's share of the lands in respect of which an apportioned part of the rent is recoverable; and that in point of law the principle of apportionment in favour of the assignee of a share is applicable whether the severance occurred before or after the execution of the instrument constituting the covenant.

The Court made an order that the plaintiffs' motion should stand refused with costs.

Solicitors for the plaintiffs: *White & White.*

Solicitor for the defendant: *Thomas Conway.*

C. L.

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STEELE v. DOWLING (1)

Nov. 1, 17. *Parliament—Registration of voters—Service franchise—Married soldiers living in barracks—Representation of the People Act, 1884 (48 Vict. c. 3), s. 3.*

Married officers and non-commissioned officers occupied during the qualifying period, with their wives and families, quarters in barracks allotted to them. They took their meals in their quarters; each had a key, and could go in and out of his quarters during the day without hindrance. The quarters consisted of a sitting-room, with one or more bedrooms, and scullery. The barracks were subject to military control; the commanding officer, who lived outside the barracks, could move an officer to other quarters. Quarters were liable to inspection, and non-commissioned officers could not be out of barracks after midnight without a pass, and lights in quarters were to be out at a certain hour.

Held, reversing the decision of the revising barrister, that each officer or non-commissioned officer occupied his quarters as a dwelling-house by virtue of service, and was entitled to the franchise.

McDaid v. Barton, 4 Lawson 61, distinguished.

CASE STATED by the revising barrister for South County Dublin Division.

The case set out as follows :—

“The name of John Steele appeared on the Long List for the Unit of Rathmines and Rathgar West, South County Dublin Division, as follows :—‘Steele, Captain John. M. 1, Portobello. Inhabitant Occupier, Barracks. Rathmines West,’ and was duly objected to by the respondent. The names of eighty-nine persons in the schedule hereto annexed also appeared as therein described, and were duly objected to.

“The facts established by the evidence were as follows, and related generally to the names of Captain Steele and of the other persons mentioned in the schedule, all of whom reside in the

(1) Before PALLES, C.B., and HOLMES and CHERRY, L.JJ.

Portobello Barracks, and are married officers or married non-commissioned officers :—

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“ The outside gate of the barracks is shut at 10 o'clock at night, and is in charge of the sergeant of the guard. In reference to married men and all non-commissioned officers, every one of them, subject to good conduct, holds a pass, enabling him to stay out if he wishes until 12 o'clock midnight only. However, if any one of them wishes to stay out after 12 o'clock, he may procure from the company officer and from the commanding officer permission by an ‘ All-night pass ’ to stay out until reveille in the morning, at which time all persons must be in the barracks to answer their names. ‘ All-night passes ’ are by custom issued by the commanding officer. If a man with a permanent 12 o'clock pass had not got an ‘ All-night pass,’ and arrived later than 12 o'clock, he would be admitted; but the sergeant of the guard would report such case of lateness, and the man would be punished unless it were his first offence. If he was drunk and disorderly, he could be locked up in the guard-house. The regulation as to arriving not later than 12 o'clock does not, however, apply to commissioned officers.

“ In all married quarters the principal and necessary portions of the furniture, such as tables, chairs, washstands, wardrobes, and the like are supplied by the army authorities, but married men may, and do, add extra articles, such as curtains, carpets, or an easy chair, of their own property. Married men are supplied also with coal, food, and gaslight. There is a strict rule against having lights in the rooms after a certain hour. The order is ‘ Lights out ’ at 10.15 p.m. for all the barracks; but it is not so strictly enforced in the married as in the unmarried quarters. The married men cook their food in their quarters; and each man has a key of his own quarters, and may go in and out of his apartments at any time during the day without hindrance.

“ The poorest quarters have a sitting-room, bedroom, and scullery, and perhaps a joint w.c. With a bigger family a married man might have allotted to him, according to the size of his family, ‘ B ’ quarters, having two bedrooms, or ‘ C ’ quarters, having three bedrooms. When a married man goes off

Appeal. on leave, he may retain the key of the quarters which had been
 1913. allotted to him.

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 DOWLING. "A company officer is entitled to enter the apartments of the married man, not to interfere with the mode of living, but to inquire in regard to complaints. If the officer did not get admission, there would be at once a report to the orderly room, and the man would not refuse a second time. The door would not be broken open, but the soldier might be struck off the 'married roll,' or otherwise punished. He has no right to refuse admission to the company officer.

"Men in barracks cannot receive visitors after 10 o'clock p.m. Civilians are not admitted at all after 10 o'clock p.m. to the barracks, but if a civilian happened to be visiting a married man in his quarters, he might remain for a reasonable time after 10 o'clock p.m., when he must leave. The commanding officer has absolute power to shut up the barracks, and prevent any person from entering or leaving, but only in the event of riot or mutiny or the like would such a power be exercised. The residence of Colonel Hill, the officer commanding the troops, was, during the qualifying period, Roebuck House, Clonskeagh.

"Unless ordered on duty, no person may leave the barracks after 9.30 o'clock p.m.

"The barracks are under perpetual military control, the officer in command being the senior commissioned officer for the time being present. A commanding officer can move any of the married men from one set of apartments to another at any time without notice; and the doctor could similarly remove a man and his family from one set of rooms to another, as, for instance, in the case of an increase of the family.

"There is a key for every door, and the married men are bound to be in their own quarters at night, and must sleep there; any absence from their allotted quarters is an absence without leave. Non-commissioned officers would be reported for arriving after 12 o'clock, just as privates would be reported for breach of discipline by arriving after 10 o'clock p.m.

"The medical officer has the right to enter any quarters at any time, and inspect and report.

"It was argued on behalf of the claimants (1) that the restrictions and discipline did not in any appreciable degree differ from that exercised in cities and towns in the case of private houses by public authorities, such as sanitary inspectors, or by public officers, such as police preventing access to a street; and that there was not such evidence of superior control as to prevent the several quarters from being separately occupied as dwelling-houses; and that, as none of the claimants messed together at a common mess, the cases were distinguishable from those dealt with in *McDaid v. Barton* (2), and that that decision did not apply.

"For the objector it was urged that the restrictions proved were inconsistent with the idea of dwelling-houses separately occupied, and that there was no contractual right to the occupation of the several rooms; that the claimants could have rooms allotted to them, or be changed from their rooms to others, without the men's assent and without notice; that lights should be quenched and visitors should leave at a definite hour; that no person could leave the barracks after 10 o'clock; and that the company officer and medical officer had at all times a right of entry into any part of the quarters; and that such drastic rules and prohibitions affecting the mode of life of the claimants in the several sets of rooms, showed such superior control as to prevent the claimants from claiming the franchise; and the cases of *Ladd v. Purcell* (3), *O'Brien v. McCarthy* (4), and *Ladd v. O'Toole* (5) were relied on.

"I was of opinion that the incidents were not consistent with the ordinary idea of a man's dwelling; that the constant superior control exercised throughout the barracks, carrying with it prohibitions and punishments in respect of the use of the rooms, and the restrictions upon personal freedom of ingress and egress when the claimants were not on duty, deprived the rooms of the characteristics of a true home. Accordingly, I found that Captain John Steele did not occupy 'M. 1' as a separate dwelling, and I expunged his name.

"In the several cases mentioned in the schedule (eighty-nine

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(1) They were voters on the Long List or Register, not claimants.—
[REP.]

(2) 4 Lawson, 61.

(3) 3 Lawson, 190.

(4) [1912] 2 I. R. 17.

(5) [1904] 2 I. R. 389.

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in all) the facts were identical in all material respects, and the list of them was agreed upon by the solicitors for the appellant and respondent respectively. I allowed the objections in each case, and expunged the names of each of the persons on the same ground; and as the point of law, viz., 'Was there evidence to sustain my finding?' is the same in each, I hereby consolidate the appeals. If there was no evidence in support of my decision, having regard to the principles laid down in the above-mentioned cases, and also in the cases of *Bannon v. Hanrahan* (1) and *McQuaid v. Charlton* (2), then the names should be restored to the list, otherwise they will remain expunged."

Heury, K.C., and *Russell* for the appellants :—

O'Brien v. McCarthy (3) is relied on in support of the decision of the revising barrister in the present case; but that case merely decided that a room used as a bedroom only could not give the service franchise. Lord O'Brien, L.C.J., there, at pp. 30, 31, distinguished *Atkinson v. Collard* (4) as a case of two rooms. The question of soldiers in barracks came up in the following year in *McDaid v. Barton* (5); that case dealt with unmarried soldiers, and established the same point as *O'Brien v. McCarthy* (3), where the man's dwelling was the asylum. But in the case of the married soldier, his rooms are his dwelling-house; he has no other.

If the decision of the revising barrister here is right, soldiers and other servants of the Crown would be excluded from the franchise. The statute shows that servants of the Crown were intended to be included, for 48 Vict. c. 3, s. 9, provides that where the hereditament by reason of belonging to the Crown is not rated, the requisition form is to be served on the chief local officer being superintendent of the hereditament, and s. 9, sub-s. 9, provides that "where a man inhabits a dwelling-house in respect of which no person is rated by reason of its belonging to the Crown, such person shall not be disentitled to be registered as

(1) [1908] 2 I. R. 455.

(2) [1904] 2 I. R. 383.

(3) [1912] 2 I. R. 17.

(4) 16 Q. B. D. 254.

(5) 4 Lawson 61.

a voter by reason only that no person is rated in respect of such dwelling-house."

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The Scotch case of *Shortt v. Wright* (1) was the case of an asylum, like *O'Brien v. McCarthy* (2), and was decided in favour of the franchise. *Atkinson v. Collard* (3) was followed in Scotland in *Gay v. McGill* (4). It was only dissented from in *McDaid v. Barton* (5) so far as it decided that a mere bedroom could give the service franchise. It shows that the element of control always comes in in the service franchise, and does not deprive the servant, who would otherwise be entitled, of the vote. Suppose the case of the occupier of a gate-lodge in a demesne, the gates of which were locked at night, would the occupier be deprived by reason of that? *Ladd v. Purcell* (6), relied on by the revising barrister, was not a case of service franchise. *Ladd v. O'Toole* (7) was the case which led up to *O'Brien v. McCarthy* (2). Lord O'Brien, L.C.J., there explains why he dissented from *Stribling v. Halse* (8), and points out that the judges in that case did not consider the purposes for which the room was used. Here the purposes are stated, and are all for the user of it as a dwelling. The restriction as to hours cannot prevent the rooms being a dwelling-house, if they are so used. They would clearly be a dwelling-house if they were outside barracks. The revising barrister has drawn a wrong inference from *McDaid v. Barton* (5). Occupation by virtue of service necessarily implies some control over the servant by the master.

Serjeant Sullivan, K.C., and Ronayne, for the respondent.

The occupier of part of a house who claims the franchise must show that he has the exclusive use of part: 41 & 42 Vict. c. 26, s. 5. That occupation must be of a more exclusive character than that of an ordinary dwelling-house: *McBride v. Bryans* (9); *Coyle v. Mahon* (10). Occupation without contract will not give the service franchise: *Holland v. Chambers, John Nicoll's Case* (11).

(1) 3 Lawson, 386.

(2) [1912] 2 I. R. 17.

(3) 16 Q. B. D. 254.

(4) 1 Lawson, 16.

(5) 4 Lawson, 61.

(6) 3 Lawson, 190.

(7) [1904] 2 I. R. 389.

(8) 16 Q. B. D. 246.

(9) [1908] 2 I. R. 329.

(10) [1908] 2 I. R. 622.

(11) 2 Lawson, 3.

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In *Ladd v. O'Toole* (1), Lord O'Brien, L.C.J., puts five tests. First, that there is no contractual right to the room. That applies here. Second, the power to remove. That applies here, too. The third prohibition, against receiving guests, does not apply here. The fourth, that the furniture is not theirs, applies here, as most of the furniture is supplied by Government. The fifth, that servants are provided, does not apply here. *Ladd v. O'Toole* (1) follows in this respect *Bannon v. Hanrahan* (2), *McQuade v. Charlton* (3), *McDaid v. Balmer* (4), and *Clutterbuck v. Taylor* (5). Here the right of access to the rooms and the use of them are restricted by the King's Regulations. [They referred to par. 1022 of the King's Regulations.] The married men may be shifted, *e.g.*, if the family increase and the rooms are too small. The furniture is of the most movable character, as soldiers may be ordered away at any time. Soldiers are not entitled to any special consideration as to the franchise. There is only one household franchise. The occupier of a room in a tenement house cannot get a vote, unless the control over the room is in him: *Ladd v. Purcell* (6). *McDaid v. Barton* (7) applies here.

Henry, K.C., in reply:—The *ratio decidendi* of *McDaid v. Barton* (7) was that the room was only a bedroom. It is not a question of contractual right; it is a question of occupation by virtue of service. If the argument of the other side is to prevail, no servant of the Crown could get a vote. *Holland v. Chambers, John Nicoll's Case* (8), was the case of father and son; there was no right to occupy. The voters here are in occupation because they are servants of the Crown. Events may happen which will determine their occupation, but they may not happen, and did not happen. Each case must be looked at retrospectively. A tenancy at will may be determined at any time, and yet it is sufficient to give the franchise: *Baldock v. Brady* (9). It is said that the commanding officer may enter the quarters, but so may a

(1) [1904] 2 I. R. 389.

(2) [1900] 2 I. R. 455.

(3) [1904] 2 I. R. 383.

(4) [1907] 2 I. R. 345.

(5) [1896] 1 Q. B. 395.

(6) 3 Lawson, 190.

(7) 4 Lawson, 61.

(8) 2 Lawson, 3.

(9) 3 Lawson, 129.

policeman enter licensed premises. The King's Regulations do not affect the case. The rules as to lights are only under the head of "Precautions against Fire." The Regulations were referred to in *Atkinson v. Collard* (1), and the argument based on them was put forward in that case, but was disposed of by the judgment of Cave, J., which has been acted on down to the present. In *Holly v. Burke* (2), a gardener who occupied a room over a coach-house in an enclosed yard belonging to his employer, was held entitled to the franchise.

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Cur. adv. vult.

PALLES, C.B.:—

Nov. 17.

The question on this appeal is whether the appellant, Captain Steele, is entitled to be registered as a voter as an inhabitant householder under the service franchise.

Captain Steele, who is married, resided with his family during the qualifying period in Portobello Barracks. His quarters consisted of a sittingroom, bedrooms, sanitary accommodation, and scullery. He and his family have their meals in the sittingroom. He has a key of his rooms, and can enter or leave them at any time of the day or night without hindrance.

The barracks are under perpetual military control, the officer in command being the senior commissioned officer for the time being present. The residence of Colonel Hill, the officer commanding the troops, was, during the qualifying period, not in the barracks but at Roebuck House, Clonskeagh.

I apprehend that were such dwelling-rooms situate in an ordinary house and not in barracks, and separately occupied, as they were by Captain Steele, they would, under 41 & 42 Vict. c. 26, sect. 5, be held to be a dwelling-house, and that their habitation by Captain Steele by virtue of his commission in the army would entitle him to be registered as a voter.

It is objected, however, that the military control over the barracks (the nature and particulars of which have been found by the case) prevents this result ensuing. Whether it has or has not this effect is the question for decision. The consideration of this

(1) 16 Q. B. D. 254.

(2) 22 L. R. Ir. 463.

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question has been so curiously mixed up with the decision of this Court in *Ladd v. O'Toole* (1), which to my mind has no bearing upon it, that it will be convenient that I shall in the first instance remove this element from the discussion.

The decision in *Ladd v. O'Toole* (1) was that this Court declined to follow as an authority the English decision of *Stribling v. Halse* (2). *Stribling* was a shop-assistant, who by virtue of his employment occupied a furnished bedroom in a dwelling-house belonging to his employers. The house contained other bedrooms similarly occupied by other persons in the same employment, all of whom took their meals in common in another room provided by the employers. The decision there was that of Coleridge, C.J., Grove and Cave, JJ. Coleridge, C.J., in giving judgment, referred to a doubt expressed by Brett, L.J., in *Bradley v. Baylis* (3), whether a person could be said to separately occupy a bedroom as a dwelling-house when he dwelt partly in the bedroom and partly in a sittingroom, and did not dwell in one exclusively. The Chief Justice states (p. 250) that, in deference to the doubt so expressed, they allowed a case to go to appeal, and that the doubt was removed. In this last observation the reporter points out that the Chief Justice was in error, and that *Ancketill v. Baylis* (4), which arose out of *Bradley v. Baylis* (5), turned on a different point. Grove, J., makes his observations in almost similar terms, and, accordingly, the decision, which has been much cavilled at in England, was arrived at, and leave to appeal was refused.

In *Ladd v. O'Toole* (1) this Court, as I have said, declined to follow *Stribling v. Halse* (2). The real ground of the judgment is tersely put by the Lord Chief Justice on page 402 of his judgment. "I would like to say why I think *Stribling v. Halse* (2) is wrong. I think the judges proceeded on the view that once it was found there was separate occupation of a bedroom it followed that there was separate occupation of a dwellinghouse. This is the fundamental error. Separate occupation of a room in which

(1) [1904] 2 I. R. 389.

(4) 10 Q. B. D. 577.

(2) 16 Q. B. D. 246.

(5) 8 Q. B. D. 195.

(3) 8 Q. B. D. 195, at p. 233.

a person sleeps may be an element in determining whether it is a bedroom strictly so called or a dwelling; but it does not necessarily follow because a room is separately occupied as a sleeping apartment that the room so occupied is a separate dwelling."

The substantial ground of decision in *Ladd v. O'Toole* (1) was that the applicants, although they slept in separate apartments, took their meals together in a common dining-room. It has no more to say to the present question than has the *Six Carpenters' Case*, and the same observation applies to *O'Brien v. McCarthy* (2). In it the common dining-room, and not the question of control, was the *ratio decidendi*. Indeed, Lord Justice Holmes, on page 37, expressly reserves his opinion in reference to soldiers. "The case of soldiers," he says, "for some reason has never been raised or discussed in this Court, and I do not wish to anticipate the result if it ever is."

McDaid v. Barton (3) was a case relating to non-commissioned officers and unmarried commissioned officers, all of whom were bound to dine at mess, and the case was treated as one virtually involved in *O'Brien v. McCarthy* (2), which did not rest on the question of control.

Now, as to the case of military control, it must be regarded, as Mr. Henry rightly pressed upon us, from a point subsequent to the qualifying period, not from one antecedent to it.

It depends on the actual occupation during the qualifying period. Had there been an insurrection, Captain Steele might have been removed from his rooms altogether. But so might a weekly tenant be removed from his occupation, and lose his right to a franchise which he retained because he was not so removed.

In the present case the extent of the control is not as much as, certainly not more, than that in *Atkinson v. Collard* (4). It was there pressed by Mr. Asquith, and is answered in the considered judgment of the Court in these words: "A servant does not the less inhabit a dwelling-house, nor is it the less a dwelling-house, because the master makes and enforces regulations for the good

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(1) [1904] 2 I. R. 389.

(2) [1912] 2 I. R. 17.

(3) 4 Lawson, 61.

(4) 16 Q. B. D. 254.

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 1913. the master retains himself or delegates to others the power of
STEELE entering a servant's house for the purpose of maintaining order
v. prevent the servant from having the sole and exclusive use of the
DOWLING. house."
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I entirely agree in this opinion, and hold that the decision of the revising barrister should be reversed, and that Captain Steele should be placed on the register.

HOLMES, L.J.:—

The legislation that purports to prescribe the conditions entitling a man to the parliamentary franchise has given rise to more perplexing questions than any other statutory code that comes before our Courts, and of these questions, the most difficult are, in my opinion, those that relate to what is called the service franchise. As might be expected, it is hard to reconcile the decisions thereon with each other; and propositions accepted by one strong Court have been criticized or even rejected by another. A typical instance of such a decision is that in *Stribling v. Halse* (1), which held that shop-assistants, each of whom occupied exclusively by reason of his employment a furnished bedroom in a dwelling-house belonging to his employers, were all entitled to be registered as voters, although the house also contained a sitting- or dining-room in which they took in common their meals provided by their employers, who also exercised general control, by means of resident caretakers, over the whole house.

This case was decided in 1885, and from that date, notwithstanding repeated disapproval by distinguished judges in both England and Ireland, it was always followed, generally with reluctance, until 1902, when this Court, in *McQuade v. Charlton* (2), gave a decision absolutely inconsistent with it. In the following year, in *Ladd v. O'Toole* (3), the matter was again reconsidered by all the members of this Court; and although other considerations

(1) 16 Q. B. D. 246.

(2) [1904] 2 I. R. 383.

(3) [1904] 2 I. R. 389.

arose therein, we agreed that *Stribling v. Halse* (1) could not be regarded as an authority in this country. I now come to *O'Brien v. McCarthy* (2), which I think the revising barrister believed he was following in refusing a vote to Captain Steele. *O'Brien v. McCarthy* (2) dealt with the case of attendants in a lunatic asylum, each of whom had the exclusive use and occupation of a room in a building in the asylum known as the servants' quarters. The attendant slept in this room, and it was, therefore, at the least his bedroom. But it was contended that it was something more, and that having regard to the mode in which it was used, it was his dwelling-house. I said in my judgment in that case that in my opinion the principle acted on by the previous Irish authorities does not depend on small details. "The question," I go on to say, "is whether all the circumstances together are consistent with the ordinary idea of the room in which the claimant sleeps being a dwelling-house," and I suggest as a test what we are familiar with in family life. In addition to their bedrooms, there are in the asylum a recreation-room, which is used as a sitting-room by the male attendants, and at least one billiard-room. They are at liberty to use the day-rooms of the patients as recreation-rooms when the patients are gone to bed; they have also a dining-room for their own exclusive use, and they take their meals therein. Giving dwelling-house any possible meaning, I cannot conceive how the room in which an attendant, having all these advantages in different parts of the building, sleeps, can be so described. Turning to the use of that room, I find nothing in its user that is not customary in a bedroom. It was found by the revising barrister that these rooms were used by the attendants for the purpose of reading, retirement, recreation, and privacy. I have lived in many houses, in all of which I have used my bedroom for the aforesaid purposes, except, perhaps, that of recreation; and if playing a game of patience can be so described, I have used it for that purpose too. In these circumstances, the majority of the Court held that the attendants were not entitled to a vote; and although Cherry, L.J., dissented, he based his decision on English and Scotch cases, which I am of opinion this Court

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has distinctly declined to follow. Before leaving *O'Brien v. McCarthy* (1), I would add that I have not overlooked the element of control exercised by the Resident Medical Superintendent over the institution and its officers. This must necessarily be very great in a lunatic asylum; but I do not attach much importance to it in a claim for a vote based on the service franchise. In such cases there is always some control over the house and the servants; and yet such control may not be inconsistent with a servant occupying part of the house as his dwelling. The true test is, in my opinion, the mode of user. When *O'Brien v. McCarthy* (1) was before us, two years ago, I was aware that soldiers in barracks had been registered as voters without objection; and I anticipated that as a result of that decision we should be called on to hear appeals relating thereto. In the following year my anticipation was realized in *McDaid v. Barton* (2). In that case officers and non-commissioned officers who were unmarried occupied quarters in barracks, consisting of single rooms used as bedrooms, while they took their meals in a mess-room. It was admitted in that case that the position of the non-commissioned officers could not be distinguished from that of the assistants in the lunatic asylum; and all the members of the Court held that, although they were under greater restrictions than the officers in the occupation of their rooms, the occupation of the latter was the same in its essential nature as that of the former, and, therefore, the objection to their claim to vote was allowed. I have referred to the details of these cases, as I think they illustrate the difference between them and the case we are now considering. Captain Steele is a married man, living in the married quarters. The poorest of such quarters have a sitting-room, bedroom, scullery, and, perhaps, a joint w.c. With a larger family, a married man might have allotted to him two or three bedrooms. The food used by the married man and his family is cooked in these rooms, and he has a key thereof which enables him to enter them at any time. I am of opinion on this evidence that each man's quarters is in their use as much his dwelling-house as a London flat is that of its occupant. It is true that there are some restrictions on the

(1) [1912] 2 I. R. 17.

(2) 4 Lawson, 61.

enjoyment, but these restrictions are not burdensome; and, as I have already said, the service franchise always involves some kind of restraint. I am satisfied that Captain Steele and the others named in the schedule are entitled to the franchise.

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CHERRY, L.J. :—

The facts in this case differ materially from those proved in the case of *McDaid v. Barton* (1), decided by this Court last year. In that case the claimants, who were unmarried officers and non-commissioned officers living in barracks, occupied each only a single room, which was primarily used as a bedroom and only occasionally used as a sittingroom. The officers were all dining members of the mess, and partook of all their meals in the messroom, except in the case of illness. The non-commissioned officers were similarly bound to take their meals at the serjeants' mess. We held that each of the rooms thus occupied was not "separately occupied as a dwelling" within the meaning of the 5th section of the Parliamentary Registration Act, 1878, and we accordingly disallowed the votes.

In the present case the facts are quite different. Captain Steele and the other persons mentioned in the schedule are married officers, or married non-commissioned officers, living with their wives and families in the rooms allotted to them respectively in the Portobello Barracks. They take all their meals in their quarters. Each has a key of his own quarters, and can go in and out of his apartments at any time during the day without hindrance. The poorest quarters have a sittingroom, bedroom, and scullery. In better quarters one or two extra bedrooms are added. The rules as to visiting and military control are apparently the same as in the case of the unmarried officers referred to in *McDaid v. Barton* (1).

Under these circumstances I have no hesitation in holding that each of these persons "inhabits" by virtue of his "office, service or employment" the rooms allotted to him within the meaning of sect. 3 of the Representation of the People Act, 1884.

Two arguments were pressed very forcibly upon us against

(1) 4 Lawson, 61.

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the right of the voters to remain on the register, even on the supposition that we should hold that the suites of rooms occupied in each case constituted separate residences.

First, it was said that in every case of the service franchise there must be a contractual right to the premises occupied, and that here there was no such right, for the officers were liable to removal at any time. Secondly, it was urged that the amount of military control under the King's Regulations exercised by superior officers over the occupants was inconsistent with inhabitant occupancy under the Franchise Acts.

The simplest and shortest answer to these arguments is that they were put forward and overruled by the English Court of Queen's Bench nearly thirty years ago, and officers and non-commissioned officers were held, in the group of cases reported under the heading of *Atkinson v. Collard* (1), to be entitled to the franchise in circumstances precisely similar to those in the present case. Upon the questions how far contractual right to the premises is necessary in the case of the service franchise, and how far control of the occupant by persons in authority is inconsistent with it, there is happily no divergence between the English and Irish decisions, though on the question of what is necessary to constitute a separate residence there is some conflict between the decisions in the two countries. The case of *Atkinson v. Collard* (1) is not, of course, binding on this Court, but it has been acted upon in England and Scotland for a great many years, and I think we ought to follow it on these two points, though we cannot regard it as an authority in Ireland upon the main questions as to what user constitutes "residence" within the meaning of the Franchise Acts.

For these reasons I am of opinion that the decision of the revising barrister should be reversed, and that the objections to the voters' names being upon the registry should be overruled.

Solicitor for the appellants: *William V. Seddall.*

Solicitor for the respondent: *J. McDowell.*

R. ST. J. C.

O'NEILL AND OTHERS, APPELLANTS; THE COMMISSIONER OF VALUATION, RESPONDENT. K. B. Div.
1914.

THE COUNCIL OF ALEXANDRA COLLEGE AND SCHOOL, APPELLANTS; THE COMMISSIONER OF VALUATION, RESPONDENT (1). June 5, 8, 9,
10.
July 2.

Poor rate — Charity — Exemption — Hereditaments used exclusively for charitable purposes — User for educational purposes, not being for education of the poor — Valuation (Ireland) Act, 1852 (15 & 16 Vict. c. 63), s. 15 — Valuation (Ireland) Amendment Act, 1854 (17 & 18 Vict. c. 8), s. 2.

The words "charitable purposes" in sect. 15 of the Valuation (Ireland) Act, 1852, and sect. 2 of the Valuation (Ireland) Amendment Act, 1854, so far as they exempt from rating by reason of the user being educational, are limited to user for the education of the poor.

Quære—Are the words confined to charitable purposes of a public character for the benefit of the entire community?

The *dictum* in *Clancy v. Commissioner of Valuation*, [1911] 2 I. R. 173, at p. 180, that the word "charitable" in the above sections should be construed in the large sense in which it is used in the Income Tax Acts, is too general.

These were cases stated by the Recorder of Dublin under sect. 10 of the Annual Revision of Rateable Property (Ireland) Amendment Act, 1860.

THE REV. GEORGE O'NEILL AND OTHERS, APPELLANTS;
THE COMMISSIONER OF VALUATION, RESPONDENT.

The case set out as follows:—

"This was an appeal under the 22nd sect. of the General Valuation Act, 1852, from the refusal of the Commissioner of Valuation to distinguish the tenement known as University Hall, Hatch Street, Dublin, on the valuation lists, as a tenement used exclusively for charitable purposes.

(1) Before PALLES, C.B., and GIBSON and MOLONY, JJ.

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"The hall is a resident hall, or hostel, in which each student has a separate room fitted up as a bedroom and study, common dining-room, debating-room, and other general rooms usually found in clubs, for example, billiard-rooms, &c.

"The building is beautiful and artistic, lighted throughout by electricity, and, in addition to the accommodation referred to, contains a private chapel.

"Three members of the Jesuit Order are resident during the period the students may occupy rooms, which the evidence showed was from thirty to thirty-two weeks. The number of students at present is thirty-eight, and each pays a stipend of £50 in respect of the session of thirty-two weeks.

"There are no free students, and all benefits are confined to students able and willing to pay the stipend, and who are Roman Catholics pursuing studies in any of the educational establishments of the City and County of Dublin.

"There is no secular teaching whatever; and it was not suggested the stipend was an insufficient one, and in fact it is a remunerative sum for the mere board and residence of students.

"The history of the hall, or hostel, appears to be that the late Father Conmee, a member of the Jesuit Order, by his will appointed the Rev. Peter Finlay, S.J., his executor, and from this source the funds for purchase of site and building were either wholly or in part obtained. The circumstances appear in the evidence. By deed of the 18th March, 1913, made between the Very Rev. William Delany and the Rev. Peter Finlay, of the one part, and the Rev. Timothy Corcoran and the Rev. John Fahy, of the other part, the trusts of the tenement, the subject of application, were declared.

"This deed and the prospectus were put in evidence, and are to be read into and form part of this case.

"The evidence demonstrated that the user of the hall was that of a residential hostel, or club, supervised and carried on by the Jesuit Fathers for Roman Catholic students paying an adequate stipend.

"The witnesses examined gave the following evidence:—

"The Rev. Peter Finlay, S.J.—'Am executor of late Father Conmee. I settled the premises in Hatch Street; paid £2200 for

site; £26,000 cost of building. In November, 1913, executed deed; management up to certain stage familiar to me; I was not concerned with opening; accommodation for eighty students; there are forty.'

"Cross-examined:—'Money came from Mr. Kennedy I think. Institution includes all the advantages of a hotel, with intimate social college life; educational and religious training, and outdoor amusement [pamphlet referred to]. The primary idea that Catholic students shall have a home, plus religious instruction, but primarily for religious purposes; do not get board and lodging for nothing; it is exclusively for Roman Catholic students.'

"Rev. Thomas Finlay, S.J.—'I have been living-in for a few months (1913); opened in January; am managing president; responsible for the management and the students who reside there; although not a party, am familiar with trust deed; in January last opened; thirty students entered, went to about forty, there are thirty-eight now; they pay a uniform pension of £50 a year; £16 16s. a term; give them usual maintenance, board and lodging, library, help and guide them, chapel, religious instruction books; the trustees keep minutes.' [A minute-book, the 19th June, 1913, referred to.]

"Cross-examined—'Object in University Hall is same as any Catholic college.'

"Rev. T. Finlay recalled by applicant—'There are three Jesuit Fathers in charge of hall; the sessions occupy from thirty to thirty-two weeks; the three Jesuit Fathers sometimes reside, and sometimes the place kept running by servants during rest of year; the fees from students only entitle them to remain during the session.

"Mr. Clancy, for the Corporation of Dublin, contended that it was never decided that, where the work of providing board and lodging was the real object of an institution, although religious or other instruction be given, such an institution was either necessarily or *prima facie* charitable at all; that the real object in this case was to provide a home for Roman Catholics on payment of a substantial stipend, and it would be ridiculous to treat such a provision, because religious instruction or supervision was given, as a charitable trust, and certainly as one used exclusively for

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K. B. Dir. charitable purposes. He contended to do so would leave the door open to the widest abuse, and would practically enable almost every institution, educational, religious, or otherwise, to evade assessment. He relied strongly upon the statement of the law by Lord Justice Holmes in the *Cemeteries Case* (1), and insisted that the application was ruled by it.

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“Mr. Wilson, for the appellants, contended that the trusts were charitable; that the provision by which any profit or income derivable from the pension of students was absolutely dedicated to the charitable purpose, rendered the institution one exclusively used and maintained for charitable purposes within the meaning of the Act. He relied upon the *De la Salle Case* (2); the *Cork University College Case* (3); the *Clancy Case* (4); the *Pemsel Case* (5); and contended that the statement of Lord Justice Holmes, p. 171 of Irish Reports, vol. ii (1897), was not law.”

“Mr. Doyle, K.C., and Mr. Lynch, K.C., for the Commissioner of Valuation—‘This establishment is in the nature of a club for students of a limited class.’ They cited *Oxford Colleges Poor Rate* (6); the *Charterhouse Case* (7).

“I was of opinion on the facts proved that the hall was in reality a hostel for board and residence, the benefits of which were confined exclusively to persons of a named faith, able and willing to pay for the advantages it affords to students, and was not in any sense used exclusively for charitable purposes within the meaning of the 63rd section of 1 & 2 Vict. c. 56, the 2nd section of 17 Vict. c. 8, and the 16th section of 15 & 16 Vict. c. 63.

“My reasons for dismissing this appeal are more fully stated in the judgment delivered by me.

“The appellants, under the 10th section of the Annual Revision of Rateable Property (Ireland) Amendment Act, 1860, requested me to state a case for the opinion of the King’s Bench Division on the following question:—

“Whether on the facts in this case the University Hall is a

(1) [1897] 2 I. R. 157, at p. 171.

(2) [1896] 2 I. R. 538.

(3) [1911] 2 I. R. 593.

(4) [1911] 2 I. R. 173.

(5) [1891] App. Cas. 531.

(6) 8 E. & B. 184; 27 L. J. M. C. 33.

(7) 25 Q. B. D. 121.

tenement used exclusively for charitable purposes within the meaning of 17 Vict. c. 8, sect. 2, as controlled by the 15 & 16 Vict. c. 63, sect. 16." K. B. Div.
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The objects of the foundation as set forth in the deed of trust were as follows:—

"1. To provide for Roman Catholic men pursuing courses of study or research in the city of Dublin, whether in University Hall itself, or at any university, laboratory, library, professional, commercial, or other schools, or elsewhere (hereinafter called 'the beneficiaries'), an institution (with or without residence) which shall offer facilities for the pursuit of such study and research, and shall at the same time be conducted and managed with a particular view to the spiritual, intellectual, moral, and social wants of the beneficiaries as Roman Catholic students, and so as to afford them as well common academic life as adequate spiritual and moral supervision and guidance in accordance with the tenets and principles, doctrinal and disciplinary, of the Roman Catholic Church. COUNCIL OF
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"2. To provide lecture-rooms and class-rooms for the delivery of lectures or the other imparting of instruction, and the conducting or the assisting of study, secular or religious, and either independent of or supplementary to the study or researches so being pursued by the beneficiaries as aforesaid.

"3. To provide places of meeting for social intercourse and discussion or debate among the beneficiaries or any group or number of the beneficiaries pursuing the same or similar courses of study or research or having common interests.

"4. To provide for the beneficiaries a chapel or other place for divine worship and religious instruction, and otherwise to enable them to obey the precepts and enjoy the ministrations of the Holy Roman Catholic Church.

"5. To provide the beneficiaries with a library and reading-rooms and study halls.

"6. To provide a residence or residences for such persons as shall for the time being be engaged in governing or administering the trust property, or discharging or fulfilling any of the trusts or objects in these presents contained or expressed, whether

K. B. Dir. as ministers of religion or teachers or lecturers, or otherwise
1914. howsoever.

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VALUATION. or entertainment of the beneficiaries or of any of them.

"8. And generally to provide for any other objects, ends,
COUNCIL OF or purposes having in view the educational, spiritual, moral, or
ALEXANDRA intellectual well-being or requirements of the beneficiaries as
COLLEGE the trustees shall in their absolute and uncontrolled discretion
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Hugh Kennedy (with him *Denis Henry, K.C.*, and *Herbert Wilson, K.C.*), for the appellants:—

The House of Lords has now finally determined the meaning of the term "charitable" as used in any statute; and they specifically considered the interpretation of the term in Irish statutes: *Commissioners for Special Purposes of Income Tax v. Pemsel* (1). The definition so arrived at, and summarized by Lord Macnaghten at pp. 582, 583, is applicable to the interpretation of the exemptions in sect. 63 of the Poor Relief (Ireland) Act, 1838, sects. 12, 15, and 16 of the Valuation (Ireland) Act, 1852, and sect. 2 of the Valuation (Ireland) Act, 1854: *per* Palles, C.B., in *Clancy v. Commissioner of Valuation* (2). The Recorder has not found that the University Hall premises are used otherwise than as provided by the deed of declaration of trust by which they are settled, and the hereditaments must be taken to be used strictly for the purposes specified in that deed. Such user is a user for charitable purposes as defined by *Pemsel's Case* (1), and is exclusively so, no other user of the premises being found or proved as a fact. The fact that a stipend is paid by the persons enjoying the benefits of the charitable user does not deprive the user of the hereditaments of its exclusively charitable character, because that stipend is bound by a trust and must be applied to the same charitable purposes: *Bangor University College Case* (3); *Pembroke U. D. C. v. The Commissioner of Valuation* (4); and by necessary implication so laid down in *Waterford Guardians v. Barton* (5). The Recorder was wrong in holding himself bound

(1) [1891] A. C. 531.

(4) [1904] 2 I. R. 429.

(2) [1911] 2 I. R. 173, at p. 180.

(5) [1896] 2 I. R. 538.

(3) 78 L. J. K. B. 578.

by the passage cited from the judgment of Holmes, J., in *K. B. Div. Cemeteries Committee v. Commissioners of Valuation* (1). That 1914.
 passage depends upon the English decisions relating to "beneficial O'NEILL
 occupation" which have been all over-ruled by the House of v.
 Lords in *Mersey Docks Trustees v. Cameron* (2), and is not, there- COMM. OF
 fore, a correct statement of the law. The current of authority VALUATION.
 has been for many years against applying the doctrine of COUNCIL OF
 "beneficial occupation" in the interpretation of the Irish Valua- ALEXANDRA
 tion Acts: *Cemeteries Committee v. Commissioner of Valuation* (1), COLLEGE
 per O'Brien, J., at pp. 183, 184; *Waterford Guardians v. AND SCHOOL*
Barton (3), per Palles, C.B., at pp. 552, 553, per Andrews, J., at v.
 p. 558; *Commissioner of Valuation v. Clancy* (4), per Palles, C.B., SAME.
 at pp. 180, 181, 182, per Gibson, J., at p. 189; *University College, Cork, v. Commissioners of Valuation* (5); per Madden, J., at
 p. 611, *et seq.*; per Kenny, J., at p. 625; *Ibid.* (6), per Barry, L.C.,
 at p. 331; per Holmes, L.J., at p. 345; *Pembroke U. D. C. v. Commissioner of Valuation* (7), per Lord O'Brien, L.C.J., at pp. 438,
et seq.; per Andrews, J., at p. 443; per Gibson, J., at p. 444.
 Though the stipend might be sufficient to pay for ordinary board
 and lodging, as the Recorder finds it is, the beneficent institution
 could not have come into being, so as to be used for the charitable
 purposes to which the simple board and lodging of the benefi-
 ciaries are merely ancillary, without the initial charitable gift of
 £26,000, which was expended in purchasing a site and erecting
 buildings to be dedicated to and used for these purposes. If any
 profit should accrue from such stipend, it must be applied to the
 same purposes under the trusts in relation to which the persons
 who pay the stipend are *cestuis que trustent*. This position is
 identical with that put by Denman, J., in *Blake v. Mayor of*
London (8), and by Pollock, B., in *Governors of Charterhouse School*
v. Lamarque (9).

[He also referred to *In re Scowcroft* (10); *Ormskirk Case* (11);

(1) [1897] 2 I. R. 157, at pp. 170,
171.

(2) 11 H. L. Cas. 443.

(3) [1896] 2 I. R. 538.

(4) [1911] 2 I. R. 173.

(5) [1911] 2 I. R. 593.

(6) [1912] 2 I. R.

(7) [1904] 2 I. R.

(8) 18 Q. B. D. 437.

(9) 25 Q. B. D. 121, at p. 122.

(10) [1898] 2 Ch. 638.

(11) [1903] 2 K. B. 498.

K. B. Dir 1914.	<i>Blake v. Mayor of London</i> (1); <i>Attorney-General v. Bagot</i> (2); <i>Shillington v. Portadown U. D. C.</i> (3); <i>Re Estlin</i> (4); <i>Trustees of</i>
O'NEILL v.	<i>Magee College v. Commissioner of Valuation</i> (5); <i>R. v. St.</i>
COMMR. OF VALUATION.	<i>Giles</i> (6); <i>R. v. Sterry</i> (7); <i>R. v. Baptist Mission</i> (8); <i>Londonderry</i>
COUNCIL OF ALEXANDRA COLLEGE	<i>Bridge Case</i> (9); <i>Belfast Harbour Commissioners v. Commissioner</i>
AND SCHOOL v.	<i>of Valuation</i> (10); 43 Eliz. c. 2.]
SAME.	<i>Ronan, K.C., and Clancy, K.C.</i> (with them <i>P. A. O'C. White</i>), for the Corporation of Dublin :—

The trusts of the deed are not exclusively charitable. Persons pursuing study in their own apartments and not receiving any teaching would be within the terms of the deed. "Place of amusement" would cover the establishment of a music-hall. The benefits are not confined to the inmates of University Hall. The funds are applicable to purposes wholly unconnected with education in the sense of teaching. There are no free students. The place is exclusively for the education of the rich. Payment by the parties does not prevent an institution from being public, but does prevent it from being charitable. Small payments may not prevent a foundation from being charitable; but here the object of payment is to have a select club for young gentlemen of the upper classes. Here there is no connexion with any university. A mere home for students is not a good charity. An uneducational charity from which the poor are necessarily excluded does not fall within the Act.

The Poor Law Acts and the Valuation Acts are *in pari materia*: *Moore v. Boyd* (11). It is contrary to reason that the exemption in the Acts of 1852 and 1854 should be different from that in the Act of 1838.

P. Lynch, K.C., and J. M. FitzGerald, for the Commissioner of Valuation.

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|-------------------------|--------------------------|
| (1) 19 Q. B. D. 79. | (7) 12 Ad. & Ell. 84. |
| (2) 13 Ir. C. L. R. 48. | (8) 10 Q. B. 884. |
| (3) [1911] 1 I. R. 247. | (9) I. R. 2 C. L. 577. |
| (4) 72 L. J. Ch. 687. | (10) [1897] 2 I. R. 516. |
| (5) I. R. 4 C. L. 438. | (11) [1911] 2 I. R. 579. |
| (6) 3 B. & Ad. 573. | |

Henry K.C., in reply :—

The object of the deed is religious, viz., to provide a place where Catholic students can be supervised by Catholic clergymen. There is no private profit or use here. In education you must provide a certain degree of amusement. This is a licensed hall of residence under the National University.

Cur. adv. vult.

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THE COUNCIL OF THE ALEXANDRA COLLEGE AND SCHOOL,
APPELLANTS; THE COMMISSIONER OF VALUATION, RESPONDENT.

The case set out as follows :—

“This was an appeal under the 22nd sect. of the General Valuation Act, 1852, by the council of the Alexandra College and School, from the refusal of the Commissioner of Valuation to distinguish in the valuation lists made out by him, as altogether of a public nature or used exclusively for public purposes or as used exclusively for charitable purposes, the premises known as 4, 5, 6, and 7, Earlsfort Terrace, constituting the Alexandra College, and the lady principal's residence, and Nos. 8 to 11, inclusive, Earlsfort Terrace, constituting the Alexandra School.

“The grounds of the appeal as set out in the notice of appeal were:—(a) that the said hereditaments and premises are of a public nature; (b) that the said hereditaments and premises are used for public purposes; (c) that the said hereditaments and premises are used exclusively for charitable purposes; (d) that the said hereditaments and premises are used exclusively for the purposes of Science, Literature, and the Fine Arts; (e) that the valuation of the said hereditaments and premises had not been made and carried out in accordance with the Statutes or Orders in the title mentioned. The grounds (a) and (b) were, at the hearing, limited by the leading counsel, Mr. Brown, K.C., to the Alexandra College proper; and (d) and (e) were not opened, relied on, or mentioned, and this case has no connection whatever with them.

“The Alexandra College was founded in the year 1866 by Mrs. Anne Jellicoe, with the assistance of the late Archbishop Trench, and other persons interested in promoting the

K. B. Div. higher education of women. Funds were obtained partly by
 1914. — subscriptions and donations amounting to over £8,700, and
 O'NEILL partly by the issue of debentures; and the college and school
 v. have always been managed by a council consisting exclusively
 COMM. OF of members of the Church of Ireland.
 VALUATION.

COUNCIL OF "The school was founded by the council in the year 1873,
 ALEXANDRA under the name of Alexandra School, and affiliated to Alexandra
 COLLEGE College, and was at first established at No. 73, St. Stephen's Green,
 AND SCHOOL South, but has since been transferred to the buildings Nos. 8 to 11,
 v. Earlsfort Terrace.
 SAME.

"The school and college were founded and are carried on primarily for members of the Church of Ireland. Daily prayers and religious instruction for such members are in fact provided in both, but under Clause 17 of the scheme, 14th May, 1887, provision is made that so long as students of other denominations are admitted, they shall not be permitted to remain during the time of religious instruction. The clause is found at page 16 of the calendar. The college and school are secular in this sense only.

"By a scheme framed under the Educational Endowments (Ireland) Act, 1885, and approved by an order in council dated 7th October, 1887, and since amended—(a) by an amending scheme approved by an order in council dated 6th November, 1893, and (b) by a further amending scheme dated 15th July, 1903, and framed by the Commissioners of Charitable Donations and Bequests for Ireland, the governing body of Alexandra School and College was incorporated by the name "The Council of Alexandra College and School, Dublin," with perpetual succession and a common seal and power to acquire and hold property.

"At the hearing, printed copies of the Alexandra College calendar for the years 1904 and 1911 were put in evidence, in which appear the prints of the schemes already referred to, the list of fees of both college and school, and other particulars with reference thereto.

"A statement of details of revenue and expenditure for the years 1901 to 1911 was furnished by Mr. Crook; statement of the college and school accounts for the year ended 31st December, 1912, printed and circulated amongst the members of the council;

certificate of the valuation of the college and school premises issued by the General Valuation Office. The foregoing documents shall be deemed to form part of, and to be incorporated with, this case.

"At the hearing, Mr. Robert Crook, M.A., the secretary and bursar of the college, and Miss White, the lady principal of Alexandra College, gave evidence on behalf of the council. The following is the evidence:—Mr. Crook, bursar and secretary, was examined; produced calendar which contains scheme as settled by Privy Council; the abstract showing expenditure; no portion of income expended except for purposes of scheme; No. 4 is residence of Miss White; she has free occupation as part of her salary; she has part of No. 4; No. 5 is a residence for students; pay £58 for education, and pay the college fees; the school and college term forty weeks out of the fifty-two. There are thirty-eight resident students; there is no more room. Miss Russell is in charge of residence house. She resides there, and is paid a salary of £100 a year. Nos. 6 and 7, college proper, class rooms, lecture rooms; there are bedrooms over top of No. 6; Nos. 8, 9, 10, 11 are exclusively for school. The head mistress resides, and has free use of room as part of her salary. The net income for ten years was £6270; every penny of income has been applied to purpose of institution.

"Cross-examined—'Good many high-class girls' schools in Dublin. We regard Alexandra as premier school; it is a successful undertaking. The college was instituted in 1866; Mrs. Jellicoe was the founder. The school and college for higher education of ladies not intended to be free; no lady educated free. The idea is the education of women at substantial fees. The school is only for girls under sixteen, none over sixteen eligible; the course of education is what is ordinarily taught in high-class schools. This is a secular school, and is open to reception of everyone. It is true also of college; both are non-sectarian. Miss Fletcher is an outside lady who receives pupils to attend the school. She retains £48 for residence. The genesis of college: in 1866 the public subscribed £8760 9s. 4d., and out of that it has grown. The patron is Queen Alexandra. The daughters of Lord Dudley, the ex-Lord Lieutenant, attended the school.

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K. B. Div. “‘The college is attended by—Presbyterians, 26; Methodists, 18;
 1914. Friends, 4; Roman Catholics, 16; Baptists, 2; Unitarians, 3;
O’NEILL Undenominational, 3; rest Church of Ireland. The School—
v. Church of Ireland, 215; Presbyterians, 38; Methodists, 13;
COMM. OF Friends, 5; Roman Catholics, 21; Congregationalist, 1;
VALUATION. Hebrews, 16; Unitarian, 1; Church of England, 14; Baptists, 6;
 Undenominational, 3.
COUNCIL OF “‘The exhibitions and scholarships are open to all denomina-
ALEXANDRA tions; highest scholarship got last year by a Roman Catholic.
COLLEGE The scholarship last spring obtained by a Roman Catholic. We
AND SCHOOL are bound to take any student whatever. The largest scholarship
v. is given on terms that open it to all creeds.’
SAME.

“Miss White, lady principal, examined—‘Since 1890 I am connected with College. I was a student. There have been outside subscriptions for enlarging Jellicoe Hall; £400 given by a friend. So far as I am aware everything devoted to the premises. Social standing is not a condition, nor is religious profession, nor religious belief. We have a residence with special arrangements for Presbyterians and Methodists. There are five Presbyterians, and one Roman Catholic. We have always had a percentage of Roman Catholics, and they are represented on staff, much about the same proportion.’

“Cross-examined—‘The foundation of College: debentures, and money subscribed. It was not a private school; fees have always been paid to council, and there always has been a council. Never a private school; different funds obtained by me from friends to help scholars who are badly off, i.e., if a girl cannot pay her own fees.’

“At the hearing, Mr. Brown, K.C., and Mr. Longfield, counsel for the appellants, contended that since *Pemsel’s Case* (1) charitable purposes were not restricted to relief from poverty, but must be construed according to the technical meaning given to these words by English law; that the college and school were for the advancement of education, and so exempted. It was also contended that the college proper was altogether of a public nature, with the

public purpose of the higher education of women, and so excluded from assessment. K. B. Div.
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“Mr. Doyle, K.C., and Mr. Carrigan, K.C., for the Commissioner, contended that the college and school was a sectarian institution, whose council must be Protestants, and members of the Church of Ireland; that it differed in no sense from any other high-class sectarian school and college, and was on the facts only educational in purpose in exactly the same sense as any other school or college for the upper classes, and in no sense whatever charitable as regards the public nature of the college; that it did not fall within the decision of the *University College, Cork, Case* (1), or the principles on which that case was decided. O'NEILL
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“Mr. Clancy, K.C., contended on the part of the Corporation that the naming of charity school in the 1 & 2 Vict. c. 56, sect. 63, negatived the exemption of a school not a charity school.

“Having regard to the evidence before me, and the principle deducible from the decisions since the passing of the 1 & 2 Vict. c. 56, sect. 63, I was of opinion, and so decided, that the buildings used for the purpose of the Alexandra College were not altogether of a public nature, or used exclusively for public purposes, and I was further of opinion that the said buildings and premises, the subject of appeal, were in reality used for the business of a school and college for the higher education of women, and intermediate education of girls, respectively, at large and remunerative fees, and that the same were not charitable at all, or in any aspect exclusively charitable within the meaning of the statutes regulating the assessment, and the valuation for assessment, of poor rate in Ireland. I accordingly dismissed the appeal of the council, and ordered that the several parties should respectively bear their own costs.

“This case is stated by me in compliance with the request made to me pursuant to sect. 10 of the Annual Revision of Rateable Property (Ireland) Amendment Act, 1860, to state same for the opinion of the King's Bench Division on the following questions:—

“1. Is the Alexandra College altogether of a public nature, or used exclusively for public purposes?

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"2. Are the said college and school, or any of the hereditaments and premises referred to in this case, used exclusively for charitable purposes within the meaning of 17 Vict. c. 8, sect. 2, as controlled by 15 & 16 Vict. c. 63, sect. 16?"

Longfield (with him *S. L. Brown, K.C.*), for the appellants:—

In this case the foundation was a charitable one from the outset. If the earnings are returned to the institution, it is charitable. There is nothing in our scheme to authorize any expenditure except for the immediate purpose of education. We come within the principle of *University College, Cork, v. Commissioners of Valuation* (1). Our accounts have to be vouched by the auditor of the Local Government Board. No doubt the school earns money; but if money-earning does not prevent the exemption founded on public purposes, why should it prevent the exemption founded on charitable purposes?

P. A. O'C. White (with him *Ronan, K.C.*, and *Clancy, K.C.*), for the Dublin Corporation:—

Pemsel's Case (2) was a decision on the Income Tax Act. If the foundation dealt with in the *Magee College Case* (3) had been in England, income tax must have been paid on the non-charitable part of the foundation. The judgment of Holmes, J., in the *Cemeteries Case* (4) is founded on the *Magee College Case* (3), and *The Queen v. Sterry* (5). The *Magee College Case* (3) made *Sterry's Case* (5) part of our law.

J. M. FitzGerald (with him *P. Lynch, K.C.*), for the Commissioner of Valuation:—

This is not the case of a charitable trust, but of a trust for the sale of learning at its full commercial value. Once you sell education for the full money's worth, the element of charity disappears. The element of getting something for nothing was

(1) [1911] 2 I. R. 593.

(2) 1891] A. C. 531.

(3) I. R. 4 C. L. 438.

(4) [1897] 2 I. R. 157.

(5) 12 A. & E. 84.

present in all the institutions that have been exempted as charities: *K. B. Div.* see *MacDuff v. MacDuff* (1), per Lindley, L.J.; *Trustees of Psalms and Hymns v. Whitwell* (2). If the view now argued for were to be supported, any body of teachers could incorporate themselves as a charity. In *Needham v. Bowers* (3), a wholly self-supporting institution was held not to be exempt from income tax.

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S. L. Brown, K.C., in reply:—

The principle now laid down in the cases is that to constitute a charity there must be an enforceable trust of the money for charitable purposes. This principle was adumbrated in *Guardians of Waterford Union v. Barton* (4), though Palles, C.B., did not then give it judicial sanction. It was actually laid down as the law in *Clancy's Case* (5). It was recognized by Kenny, J., in *University College, Cork, v. Commissioner of Valuation* (6). I rely on Lord Herschell's speech in *Commissioners of Inland Revenue v. Pemsel* (7).

Needham v. Bowers (3) was the case of a lunatic asylum founded by voluntary subscription, but entirely supported by payments from the patients. The *St. Andrew's Hospital Case* (8) was decided on the ground that there was no legal necessity to expend the profits upon the institution.

Cur. adv. vult.

PALLES, C.B.:—

July 2.

This case comes before us upon a case stated under sect. 10 of the Valuation Revision Act, 1860, by way of appeal from a decision of the Recorder of Dublin refusing to distinguish the tenement in question as used exclusively for charitable purposes, within the meaning of the statute 17 Victoria, c. 8, s. 2.

The ground upon which the tenement the subject of the appeal—University Hall—was subsequently built, appears to

(1) [1896] 2 Ch. 451, at p. 464.

(2) 7 Times L. R. 164.

(3) 21 Q. B. D. 436.

(4) [1896] 2 I. R. 538.

(5) [1911] 2 I. R. 173.

(6) [1911] 2 I. R. 593, at p. 620.

(7) [1891] A. C. 531, at p. 573.

(8) 19 Q. B. D. 624.

K. B. Dir. have been purchased for the sum of £2000 by the Very Rev. 1914. William Delany and the Very Rev. Peter Finlay, who built upon O'NEILL it the hostel or hall in question, at an expense of about £26,000. *v.* By deed of the 18th of March, 1913, made between these COMM. OF VALUATION. gentlemen of the one part, and the appellants of the other part, it COUNCIL OF ALEXANDRA COLLEGE AND SCHOOL is recited that the hereditaments were purchased, and the buildings *v.* thereon erected, with the intention of dedicating the same to the SAME. promotion of the higher education of Catholic youth in Ireland, by providing for those pursuing their studies in the city of Palles, C.B. Dublin—(a) the advantage of common academic life, with proper guidance and moral supervision appropriate to student life in a large city (of the need of which the settlers were convinced); (b) an environment conducive to the effective and fruitful pursuit of such studies; and (c) the assistance of persons of approved learning therein; and it was thereby declared that the appellants should stand seised of the said hereditaments upon trust to use the same for all or any of certain purposes thereby declared, of which the first and principal is the following:—

“To provide for Roman Catholic men pursuing courses of study or research in the city of Dublin, whether in University Hall itself or at any university, college, laboratory, library, professional, commercial, or other schools, or elsewhere (hereinafter called the beneficiaries), an institution (with or without residence) which shall offer facilities for the pursuit of such study and research, and shall at the same time be conducted and managed with a particular view to the spiritual, intellectual, moral, and social wants of the beneficiaries as Roman Catholic students, and so as to afford them as well common academic life as adequate spiritual and moral supervision and guidance in accordance with the tenets and principles, doctrinal and disciplinary, of the Roman Catholic Church.”

The deed then contains an enumeration of other purposes, which I deem subordinate and accessory only to the main purpose which I have read.

In my view, the provision of an institution with such an object, in the city of Dublin, is of the highest educational, religious, and moral value, providing as it does for the students of a non-residential university, such as the National University,

the benefits which it lacks by reason of its not having means for providing for the residence of its students; and I should require more argument than I have yet heard to satisfy me that such an institution is not charitable within the meaning of the statute 10 Car. 1, Sess. 3, c. 1 (Ir.), substantially similar to the English statute 43 Eliz. c. 4. We have heard some criticisms from Mr. Ronan, during his able argument, founded upon the generality of some of these subsidiary clauses, and upon the extensive nature of the class described as "beneficiaries." I do not think it necessary to consider these criticisms, having regard to the ground upon which I rest my decision. It is sufficient to say that, for the purpose of this decision, I assume, without deciding, that the institution is charitable; and for the same reason I do not enter into the question of the effect upon its user of the non-provision in it, up to the present, of secular teaching.

The important matter, however, is that each student pays a stipend of £50 for his occupation of the hall during the thirty to thirty-two weeks which constitute the academic session; and that the learned Recorder has found that it was not suggested that the stipend was an insufficient one; and that, in fact, it is a remunerative sum for the mere board and residence of students.

So much for the facts which I deem material.

The question, then, is—Is University Hall used exclusively for charitable purposes, within the meaning of 17 Vict. c. 8, s. 2?

The hereditaments which under this section are to be distinguished by the commissioner, are not solely those used for charitable purposes. They include two other classes:—"All hereditaments and tenements or portions of the same (a) of a public nature; or (b) used for charitable purposes; or (c) for the purpose of science, literature, and the fine arts, as specified in the Act of the 6th and 7th years of Her Majesty, chapter 36."

Now some hereditaments of a public nature are by reason thereof of a charitable nature. One of the oldest definitions of charity is "a general public use which extends to the poor as well as to the rich": *Jones v. Williams* (1). Again, the purposes I have described as (c)—those under the 6 & 7 Vict. c. 36—are

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K. B. Div. undoubtedly charitable. Thus we have in this section the idea
 1914. of charity presenting itself in the description of three different
O'NEILL classes of exempted hereditaments; each, presumably, distinct
v. and different from the others, one of which classes is described by
COMMR. OF the general words, "used for charitable purposes." The mere
VALUATION. enumeration of these three different classes tends to show that
COUNCIL OF "charitable purposes" cannot be read in its general or unrestricted
ALEXANDRA sense as used in the English statute of Elizabeth and the Irish
COLLEGE statute of Charles. Were it so read, the first and second classes
AND SCHOOL would overlap; and it would render unnecessary the words "for
v. the purposes of science, literature, and the fine arts, as specified in
SAME. an Act of the sixth and seventh years of Her Majesty, c. 36," as
 Palles, C.B. the latter tenements are undoubtedly held for charitable purposes,
 using the word "charitable" in its unrestricted sense.

A consideration of this nature was the *ratio decidendi* of the Court of Appeal in England in *The Commissioners of Inland Revenue v. Scott* (1), a case decided a year after the decision of the Lords in *Pemsel's Case* (2), by a Court of which the President was Lord Herschell, one of the majority of the Lords in the former case. The question there was the meaning of the words "charitable purpose" in an exemption in sect. 11 of the Customs and Revenue Act, 48 & 49 Vict. c. 51, a section which imposed a duty upon property vested in bodies corporate or incorporate, subject to certain exemptions, of which No. 2 was "property . . . which shall be legally appropriated and applied for the benefit of the public at large, or of any county, shire, borough, or place"; and No. 3 was "property which, or the income or profits whereof, is legally appropriated and applied for any purpose connected with any religious persuasion, or for any charitable purpose, or for the promotion of education, literature, science, or the fine arts." There was a piece of land called the "Intack," over which the freemen inhabitants of a certain ward of the city of York enjoyed right of pasturage; and it was held by the Court of Appeal (consisting of Lord Herschell, Lord Lindley, and Lord Justice Kay) that if the words "charitable purpose" in the third exemption clause were to be extended to all charitable

(1) [1892] 2 Q. B. 152, 163.

(2) [1891] A. C. 531.

trusts, using that word in the wide sense attributed to it, the "Intack" would be within the exemption; but that "charitable" there could not be so construed. In giving the judgment of the Court in favour of the restricted construction, Lord Herschell states (p. 165) as one of the reasons for adopting such restricted construction:—"Moreover, the words in that subsection which immediately precede and follow the words 'for any charitable purpose' are unnecessary if the construction contended for be correct. It cannot be doubted that property held by a body corporate or incorporate 'for the promotion of education, literature, science, or the fine arts,' is, technically speaking, held upon a charitable trust." In distinguishing the case from *Pemsel's Case* (1), Lord Herschell points out that "after all, each statute must be looked to by itself for the purpose of ascertaining its meaning . . . in the present case, the words we have to construe are placed, as I have pointed out, between specific exemptions which, if used in their widest sense, they would be sufficient to cover, and it can scarcely be supposed that the exemptions contained in sub-sect. 2 were in the present case inserted *ex majori cautela* to allay the fears of those who might be interested in any particular institutions, for the property first described is property appropriated and applied 'for the benefit of the public at large.'"

Passing, however, from the words of sect. 2 to more general considerations as to its construction, I shall only say that the considerations I have mentioned impress me with the expectation that in the more general considerations governing the construction of Acts of Parliament I shall find reason for imposing some limitation upon "charitable" as used in this section. The part in question of this second section of the 17th Vict. c. 8, is a mere re-enactment of sect. 15 of 15 & 16 Vict. c. 63, which was thereby repealed; and the meaning of the expression "charitable purposes" in each statute must be identical. To ascertain that meaning in the 15 & 16 Vict. c. 63, we must in the first instance have clearly before us the state of the law in Ireland in relation to rating and valuation. These Valuation Acts are the evolution

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K. B. Div. of a series of Acts which extend back a considerable time, and it
 1914. will be useful to glance at some of them, even at some which had
 O'NEILL expired before 1852.

v.
 COMM. OF By an Act passed in 1826, 7 Geo. 4, c. 62, for the uniform
 VALUATION. valuation of tenements in Ireland, except those in the city of
 COUNCIL OF Dublin, and for the more equally levying of county cess charges
 ALEXANDRA and grand jury rates upon the baronies, parishes, and other
 COLLEGE divisions of counties in Ireland, it is recited that a general survey
 AND SCHOOL of Ireland was then in progress, and provision is made for an
v.
 SAME. uniform valuation consequent upon such survey of the several
 Palles, C.B. baronies and other divisions of land within the several counties of
 Ireland liable to be separately assessed to raise and pay any
 proportion of county cess charges and grand jury rates.

This Act was amended in 1831 by 1 & 2 Wm. 4, c. 51, which recited that it was not necessary or expedient for the purposes of the former Act to include in the valuation to be made thereunder, *inter alia*, "such houses, buildings, and tenements as by law or usage may be or ought to be exempted from assessment for county or parochial rates"; and enacted by section 3, that no houses, lands, or tenements which by any law or usage had been theretofore exempted from applotment or assessment for or towards cesses or rates imposed by or under grand jury presentment, should be included in the valuation; but that the committee of appeal and committee of revision respectively in each county should, as thereafter provided, have power and authority to consider and determine the justice and propriety of all such exemptions, and to make order allowing or disallowing the same accordingly. By the 6th section, from and after the assizes next after the day on which the valuation for any county, signed as prescribed by the Act, should be published in the *Dublin Gazette*, all county cess charges, and all grand jury rates, and all parish rates, are to be assessed according to such valuation. The Act does not define any class of hereditaments which are to be exempted. Everything is left to the judgment of the committee of appeal and committee of revision.

This unsatisfactory state of things was put an end to by a further amending Act, passed in the next year, 1832—the 2nd & 3rd Wm. 4, c. 73—which contains the germ of our present valuation laws.

The 3rd section of this Act enacts that in making the lists or tables of valuation the Commissioner of Valuation shall distinguish all "houses, lands, or tenements, of a public nature, or used for charitable purposes"; and that the tenements so distinguished shall be exempt from assessment for or towards all county cess charges and parish rates whatsoever; and the 4th section enacts that no houses, lands, or tenements shall be deemed to be of a public nature or used for charitable purposes within the meaning of that Act, unless they shall be "altogether of a public nature or used exclusively for charitable purposes."

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This is the first Act in which, in relation to the exemption of hereditaments, we find associated together those of "a public nature" with those used for charitable purposes.

Were the meaning of the word "charitable" in this Act to be ascertained merely from the words of the Act, and without deriving assistance from the Irish Poor Law Act of 1838 (1 & 2 Vict. c. 56), it is to be noted that user for purposes, so described, carried with it exemption from a public rate, and that tenements so described are associated in exemption from this rate with those of a public nature; and if we seek for the reasons for such exemption, we naturally would expect to find that tenements so described carried with them some benefit to the public which was the consideration for such exemption. "Public purposes" here mean purposes for the benefit of the public at large. There are, however, purposes which benefit a particular class only of the public, such as hospitals, which, if open to all the sick, benefit such of the public as being sick avail themselves of them; alms-houses, which, if open to all the poor, benefit such of the public as being poor gain admission into them; poor schools, which, if open to all requiring education, benefit such of the public as resort to them. Without saying that a construction of "charitable," limited to the class of purpose which confers benefits on a limited class of the public, would upon the construction of this act *per se* necessarily be the true one, it certainly would be a possible, nay an attractive one, and one which from a little assistance *dehors* the Act itself—such, for instance, as I find in the Poor Law Act of 1838, taken in conjunction with the Valuation Act of 1852—might beyond all doubt be shown to be the true one.

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In the *Londonderry Case* (1) the question was the meaning of "public purposes" in sect. 63 of 1 & 2 Vict. c. 56, in which it occurs in conjunction with "charitable purposes." Lord O'Hagan (then Mr. Justice O'Hagan), who delivered the leading judgment of the majority of the Court, says: "When we consider the meaning of the general 'public purposes' which exempt from rateability under the Irish Poor Law . . . we shall see that the church, the school, and the hospital are all exempted because in their several ways they are used for the public benefit of the whole community, and not for the private or exclusive user of any member of it."

These Acts were consolidated and amended by the Act 6 & 7 Wm. 4, c. 84, the 14th and 15th sections of which continue the exemption from assessment for county cess charges and parish rates of all tenements altogether of a public nature or used exclusively for charitable purposes, adding the further restriction, "so long as they shall continue to be of a public nature or used for charitable purposes." This Act is, by 6 & 7 Vict. c. 32, s. 2, to be deemed not to apply to any county of a city or county of a town.

During all this time the statutes were necessarily confined to grand jury and parochial rate, as poor rate was not then in existence.

The first Poor Law Act was passed in 1838—1 & 2 Vict. c. 56. At this time the surveys and valuations under the Acts I have already referred to had not been completed; but, by the 66th section, the Poor Law Commissioners were directed to make use of them, so far as they might in their opinion be made use of, in estimating the value of the rateable hereditaments; and so far as they were not available or sufficient the Commissioners were directed themselves to cause the necessary surveys and valuations to be made; and the Act itself defines the rateable hereditaments. In this Act the Legislature was not content to allow the exemptions to depend upon the general words contained in 6 & 7 Wm. 4, c. 84. It was much more specific. By section 63 it directed explicitly that no church, chapel, or other

(1) I. R. 2 C. L. 577.

building exclusively dedicated to religious worship, or *exclusively used for the education of the poor*, nor any burial ground or cemetery, infirmary, hospital, *charity school*, or other building used *exclusively for charitable purposes*, nor any building, land, or hereditament dedicated to or used *for public purposes*, should be rated.

It is impossible to hold that "charitable" in this section is used in the general sense in which it was read by the Courts when determining whether gifts were void as violating the law against perpetuities. Whilst it is clear that it includes some purposes for the advancement of religion and promotion of education which would be charitable in that sense, the hereditaments used for those purposes are exempted, not because their purpose is charitable, but because they answer the description of two of the sub-heads of "charity"—advancement of religion, and promotion of education. Thus they are not exempted under, and consequently their purposes are not included in, the term "charitable purposes," where it occurs in the section, which conclusively shows that in this section it is not used in the general sense attributed to it in *Pemsel's Case* (1); and even were this otherwise, the expressions, "exclusively used for the education of the poor," and "charity school," would limit the expression "charitable," in reference to education, in such a way as to exclude from its operation the hereditaments here. It could not be, and indeed was not, contended that if these cases were to be governed by 1 & 2 Vict. c. 56, s. 63, the argument for exemption could prevail.

I pass from this, with the remark that from 1838 to 1852 the exemption dependent upon use for education in counties at large from grand jury and parish rates, and from poor rates, which one would think depended upon one and the same character of use, depended, as to the two former, on whether the use was for a charitable purpose; and as to the third, upon the education in question being that of the poor—a strong circumstance towards showing that the exemption from grand jury cess and parish charges by reason of educational purposes was limited to the

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K. B. Div. education of the poor; and accordingly that the expression
 1914. "charitable purposes" in 2 & 3 Wm. 4, c. 73, and 6 & 7 Wm. 4,
O'NEILL c. 84, should be similarly restricted. To this must be added
v. that one single instance cannot be shown during these fourteen
COMMR. OF years of a tenement not exempted from poor rate being held
VALUATION. to be exempt from grand jury cess by reason of its educational
COUNCIL OF user.
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AND SCHOOL In 1843, by 6 & 7 Vict. c. 32, it was enacted that sums
v. presented by grand juries of counties of cities and counties of
SAME. towns in Ireland (except the county of the city of Dublin)
Palles, C.B. should be applotted according to the valuation and rating under
 1 & 2 Vict. c. 56; and there is an exemption clause from rating
 in the words of that contained in sect. 63 of that Act. The next
 Valuation Act is 9 & 10 Vict. c. 110. I do not refer to its pro-
 visions, as under it the valuations for poor rate and grand jury
 rate need not necessarily be identical.

I now come to an Act which, I think, can be referred to as
 showing the general intention of Parliament in relation to
 exemption from rating, and which, if it can be so referred to, is
 of much importance. I refer to the Towns Improvement Clauses
 Act, 1847, 10 & 11 Vict. c. 34—an Act which relates as well to
 Ireland as to England. It has, as is well known, no effective
 operation, *per se*, without incorporation in special Acts, but it was
 passed not only for avoiding the necessity of repetition of pro-
 visions usually contained in Acts of Parliament for improving
 towns, but also for ensuring greater uniformity in the provisions
 themselves. The object of the 168th section of this Act is to
 propose the following as the model clause for exemption from
 rating:—"Provided also that no person shall be rated to any rate
 made in pursuance of this or the special Act in respect of tithes,
 or of any church, chapel, meeting-house, or other building
 exclusively used for public worship, or any building exclusively
 used for the purpose of gratuitous education of the poor, or
 of public charity, or any building or land belonging to the
 Commissioners." This must be considered in conjunction with
 section 48 of the Act of 1852.

The reason I think this section can be referred to in reference
 to the construction of 15 & 16 Vict. c. 63, is that it was the law

which at the time of the passing of the later Act governed the rating of every town in Ireland whose special Act had incorporated that clause. K. B. Div.
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There remain two other Acts, passed in 1849, in relation to the City of Dublin—the Collection of Rates Act, 12 & 13 Vict. c. 91, and the Dublin Improvement Act, 12 & 13 Vict. c. 97.

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By section 44 of the first of these Acts, rates in the City of Dublin (with an unimportant exception) are to be levied upon the hereditaments valued under the Poor Law Act of 1838, 1 & 2 Vict. c. 56; and by section 119 of the second of these Acts, the exemption, based on education, from rates to be levied thereunder, including those under the Improvement Act, is limited to “buildings exclusively used for the purposes of gratuitous education of the poor.”

The General Valuation Act of 1852 (15 & 16 Vict. c. 63) was passed for making one uniform valuation which could be used for the purposes of all public and local assessments. For this purpose it was necessary to define one uniform class of hereditaments which should be exempt from liability to rates generally, or to some rates. There was no intention to alter the title to exemption, save so far as was necessary for the purpose of uniformity. What I have already stated shows that at the time of the passing of this Act—

1.—Exemption from poor rate, by reason of user for education, was, throughout Ireland, restricted to hereditaments exclusively used for the education of the poor.

2.—That exemption from grand jury cess, for the same reason, in the city of Dublin and the other counties of cities and counties of towns in Ireland, was also restricted to buildings used for the education of the poor.

3.—That, for the same reason, exemption from improvement rate in the City of Dublin was restricted to buildings used for the gratuitous education of the poor.

4.—That exemption from town rates by towns which had obtained special Acts in which the Towns Improvement Clauses Act, 1847, was incorporated, was restricted to buildings used exclusively for the gratuitous education of the poor. But—

5.—That in counties at large, exemption for this reason

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depended upon whether the purpose for which the building was exclusively used was a charitable purpose within the meaning of the Act 6 & 7 Wm 4, c. 84.

The class exempted by this Act, 15 & 16 Vict. c. 63 (sects. 15 & 16), is, "all hereditaments and tenements or portions of the same used exclusively for charitable purposes." The very fact that the Legislature applied to hereditaments one and the same exemption from all rates, although theretofore the exemption as to some of such rates was enacted in different words, in my opinion *primâ facie* indicates that the differences were verbal only, and that, in substance, there was one common and uniform basis for exemption.

This view is strengthened by the 46th sect. of the Act, which directs that, until the completion of the valuation, county assessments may be made upon the valuation under 1 & 2 Vict. c. 56.

In reference to towns governed by Acts incorporating the Towns Improvement Clauses Act, 1847, sect. 48 enacts that the Act shall not repeal anything in such Act relative to the management of streets or the liability to grand jury cess, or other payment in respect of making or repairing roads.

Now, the object of this Act being to introduce uniformity into the description of exempted premises, the problem is to find a common basis of exemption, between which and the previous exemptions there will not be any substantial difference, notwithstanding the diversity in the language in which the previous exemptions are described; and it is plain that the charitable basis in relation to education in the exemption under sect. 63 of 1 & 2 Vict. c. 56, being limited to education of the poor, excludes the possibility of this basis being found by reading "charitable purposes" in the broad sense used by the former Court of Chancery; and thus the application of *Pemsel's Case* (1) is excluded. To find a common basis, the only possible mode in the present case is by limiting the more general expressions. But if the expression "charitable," in reference to education, be limited to the charitable purpose of education of the poor, the

(1) [1891] A. C. 531.

matter seems free from difficulty, so far as relates to exemption depending on educational user. Hence, I ask myself, is there any reason why "charitable purposes" in 2 & 3 Wm. 4, c. 73, and 6 & 7 Wm. 4, c. 84, should, in reference to educational charities, be not restricted to those in reference to the education of the poor? I confess, speaking for myself, that, construing these Acts when they passed, and without deriving any assistance from 15 & 16 Vict. c. 63, I should be inclined so to construe them. But I have not, in the present case, to go so far, because, driven as I am by the Act of 1852 to try to find the common basis I have referred to, I read the Act as founded on the assumption that the exemption in the Act of 6 & 7 Wm. 4, based on educational use, was limited to user by education of the poor, and that, therefore, there was no difficulty in holding the exemptions in those Acts, and those in the 1 & 2 Vict. c. 56, to be practically the same, and of describing all in the one expression, "charitable purposes," using those words in a sense which would not involve the injustice to ratepayers of—in such an Act, which was intended to involve machinery only—enormously increasing the exemptions from poor-rate.

I find a strong confirmation of this view in the judgment of the late Lord Justice Barry (then Mr. Justice Barry) in the *Mayor of Limerick v. Commissioner of Valuation* (1). He says:—"That being so, I hold myself at liberty to say, that whatever construction we put upon the 63rd sect. of the Poor Law Act, we must put the same construction upon the 2nd sect. of the Act of the 17 Vict. c. 8; and it appears to me that to hold otherwise would be to attribute to the Legislature a strange design, and lead to a state of things singularly anomalous. The Tenement Valuation Acts, as I understand them, were passed for the purpose of relieving boards of guardians, and other similar bodies, from the responsibility of making valuations of the property which they have to rate. This duty has been imposed, and the power conferred upon the commissioner who has been appointed to effect a uniform valuation of property, and to supply to the boards of guardians and other bodies specified lists or tables of

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(1) I. R. 6 C. L. 420, at p. 435.

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valuation. In such lists the commissioner is bound to distinguish the premises exempt from taxation; and it seems to me that the object of this is to enable the guardians to see at a glance what premises are or are not exempt from liability to the assessment; but this intention would be defeated if a limited class of exemptions only are to be included in the commissioner's schedule, while the more numerous exemptions, under the 63rd sect., are to be left to the guardians to ascertain for themselves as best they may."

For these reasons, I am of opinion that the words "charitable purposes" in 15 & 16 Vict. c. 63, sect. 15, and consequently in 17 & 18 Vict. c. 8, sect. 2, so far as they exempt from rating by reason of the user being educational, are limited to user for the education of the poor.

I am still of opinion, as I was in *Clancy's Case* (1), that these words, "charitable purposes," include purposes charitable by reason not only of poverty, but also because of the promotion of religion, as mentioned in 1 & 2 Vict. c. 56, sect. 63; and for that reason I stated that I was of opinion that "charitable," in this section, should be construed in the large sense, in the sense in which it is used in the Income Tax Acts. I must now modify that opinion. The *decision* there was right; and I abide by all I have said save as to this one point; but I regret that I used expressions which, although not part of the *ratio decidendi*, were more general than, after the consideration I have given this case, I can now support.

The purposes in the present case are not for the education of the poor, and, in my opinion, not "charitable" within the meaning of 17 Vict. c. 8, sect. 2. Being of this opinion, it is unnecessary that I should consider the effect of the word "exclusively." I did so, so far as it was necessary, in the *Waterford Case* (2), as there the charitable purpose was, in my opinion, clearly within 17 & 18 Vict. c. 8, sect. 2, and the decision rested on the application of the word "exclusively."

I am of opinion that the judgment of the Recorder, refusing

(1) [1911] 2 I. R. 173.

(2) [1896] 2 I. R. 538.

to distinguish "University Hall" as used for charitable purposes, was correct, and should be affirmed with costs to the Corporation of Dublin who appeared to support it.

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GIBSON, J. :—

The object of both these valuable institutions is to benefit, in the way described by the learned Recorder, students in comfortable circumstances, able to pay sums commensurate with the advantages enjoyed. Their claim to immunity is quite a new departure; during the period of upwards of eighty years that the present type of exemption has existed, no such immunity has ever been allowed for establishments of this class. The principle involved is of extensive practical importance. The burden on all other ratepayers would be increased by the elimination of substantial contributories; prosperous educational enterprises, working on commercial lines, might, by adopting a charitable foundation of possibly small money value, demand and secure exoneration. Our decision must depend on two points :

1. Apart from the Valuation code, were the institutions charitable and exclusively so used?

2. If they were, does that code entitle them to exemption?

The first point might be tested by inquiring, if a fund was settled in trust to be used exclusively for charitable purposes, would the application of such fund to found or carry on the hostel or college be legitimate. In one respect the college might enjoy a more favourable position. It is distinctly educational, and it is on a statutory foundation. The hostel (which is to be considered for rating purposes not on the primary instrument of foundation, but on the status of the institution in actual operation (*The Charterhouse Case* (1)) is not connected, it is argued, with the National University; does not require teaching; and its aims, moral, religious, and social, do not, it is said, come within *Pemsel's Case* (2). On the other hand, as regards finance, though the receipts of the hostel are adequate, there is no ascertained profit, whereas the annual balance sheets of the college show a regular surplus over expenses. It is contended

(1) 25 Q. B. D. 121.

(2) [1891] A. C. 531.

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that the restriction of the advantages offered by both institutions to a well-to-do class is inconsistent with charity, exclusive or otherwise: *Re MacDuff* (1). A school for the sons of gentlemen may be a good charity: *Att.-Gen. v. Lonsdale* (2). The fees there (if any) are not stated. Would such a school for young gentlemen able to pay £100 a year each, be exclusively a charity; or would it be a class institution? If the hostel was attached to the university, its charitable status would be free from most of the objections put forward. On this first point I offer no opinion, and will assume that the question should be answered in favour of both institutions. My conclusion is based entirely on the Valuation code, the construction of which obliges me to withdraw what I said in *Clancy's Case* (3) as to *Pemsel's Case* (4) being applicable to our rating exemption.

Exemption in our rating statutes contrasts strikingly with that in general taxing enactments. 1. It is concentrated in operation, affecting limited areas to the direct prejudice of other occupiers, whereas in general statutes the effect is diffused over the entire community. Hence rating legislation is more strictly construed: *Forrest's Case* (5); *Temple's Case* (6). In *Coomber's Case* (7) the decision was based on Crown immunity. 2. The history and development of our rating system introduce considerations inapplicable to general taxing statutes. 3. The context of the Acts of 1852 and 1854, taken by themselves, repels the application of *Pemsel's Case* (4). Our enactments are preceded and surrounded by an atmosphere or accompaniment of judicial decision which may have influenced the intention and language of the legislation.

Exploration into the genesis and history of rating exemption has brought to light many important statutes not hitherto considered in any of the cases. I will first refer to these enactments; then shortly advert to some English rating statutes, and to general taxing law; and, in conclusion, say something as to the course of decision.

(1) [1896] 2 Ch., at p. 464.

(2) 1 Sim. 109.

(3) [1911] 2 I. R. 173.

(4) [1891] A. C. 531.

(5) 15 A. C., at p. 352.

(6) 2 E. & B., at p. 275.

(7) 9 A. C. 61.

The first exemption occurs in 13 & 14 Geo. 3, c. 19, dealing with valuation of houses in counties of cities and towns. It recites a doubt whether all buildings for charitable purposes and other public buildings are not liable to be rated, thus treating charity as a public purpose. It specifies the various buildings to be excluded—public, quasi-public, and charitable. The charitable class consists of hospitals, public infirmaries, almshouses, and charity schools. "Charity school" is explained by 23 Geo. 2, c. 11, and meant a school, usually a charter school, to which begging children were sent. Charter Schools, founded in 1733, were proselytising institutions, supported by many subsequent statutes: Lecky, vol. ii, p. 200. Besides charity schools, there were free schools for poor children of higher grade, which were the subject of frequent legislation from their establishment in the reign of George 1. In England charity schools and free schools were also well known: *R. v. Melborne* (1); *R. v. Catt* (2); but whether they had a statutory base does not appear. The definition of "charity school" in the Oxford Dictionary is, "a school for the free or cheap education of the poor." Under the Act of Geo. 2 it described a school for pauper children. All the subjects of charitable exemption in the statute of Geo. 3 represent true public charities for the benefit of the whole community. Places of worship are not included, probably because no doubt was felt as to their immunity. The statute was frequently before the Court from *Roe v. Darley* (3) to *McGarry v. Callaghan* (4); and it was pointed out that as to many public buildings it was declaratory, as government property required no exemption. As to charitable buildings, the same remark applies. Hospitals and almshouses were, according to English cases of the period, rate-free, and so were charity and free schools, though the masters were liable in respect of the portion occupied by them: *R. v. Catt* (2). This exemption was based, not on charitable premises being free, but on there being no occupation by any one: *R. v. Catt* (2), at p. 334. The first hospital decision was in 1760: *R. v. St. Luke's* (5).

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(1) [1715] Burr, S. C. 244.

(4) 12 I. L. R. 331.

(2) [1795] 6 T. R. 332.

(5) 2 Burr, 1053.

(3) 1 H. & B. 442.

K. B. Div. The earliest general valuation Act with an exemption,
 1914. 1 & 2 Wm. 4, c. 51, sect. 3, directs tenements theretofore by any
O'NEILL law or *usage* exempted to be excluded—language which introduces
v. 13 & 14 Geo. 3, c. 19, and the judicial decisions then accepted as
COMM. OF conferring customary immunity. At the threshold of our present
VALUATION. system, therefore, we find that both by statute and usage such
COUNCIL OF institutions as the Hostel and College would have been rateable.
ALEXANDRA The statute 2 & 3 Wm. 4, c. 73, repeals this Act; and was in turn
COLLEGE. replaced by 6 & 7 Wm. 4, c. 84. Both use the identical language
AND SCHOOL as to exemption found in the Acts of 1852 and 1854. This
v. statute of 1836 was in force till the interim Valuation Act,
SAME. 9 & 10 Vict., c. 110. Did the Legislature intend, under the
Gibson, J. expression “charitable purposes” in the statute of 1832, to
 release from a liability recognized as existing in 1831?

In establishing a new system in Ireland, to take the place of
 13 & 14 Geo. 3, c. 19, in cities, and of usage elsewhere, it may have
 been considered desirable to describe in general terms the classes
 of exemption then recognized by decision as operative; general
 public purposes for the benefit of the whole community, of a
 national material aspect, and charitable purposes of ethical
 character of the same public type, embracing dedicated churches:
Wright v. Ingle (1); nonconformist places of worship, where there
 were no pew-rents; hospitals, almshouses, and poor and charity
 schools, all of which then enjoyed immunity, save where there
 was separate profitable occupation by any particular individual
 or individuals. Public utility is dealt with under two aspects—
 “public nature” founded on general national requirements;
 and “public charity,” devoted to the spiritual, moral, and
 physical well-being of the community, of the nature above
 noticed.

The Act of 1838, sect. 63, contains five special heads of ex-
 emption relative to—(1) religious worship; (2) education of the
 poor; (3) burial; (4) any infirmary, hospital, charity school, or
 other building used exclusively for charitable purposes; (5) any
 hereditament used for public purposes. Charitable exemption is

entirely confined to buildings; it does not, as in 6 & 7 Wm. 4, c. 84, extend to tenements generally. "Charity school" seems to be what is described in 13 & 14 Geo. 3, c. 19, and is obviously not the same as "a school for the education of the poor." Such education is not, expressly at least, required to be gratuitous, as it is in other statutes. The several charities described presume the necessity of financial aid.

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All the purposes described before "public purposes" relate to soul, mind, and body, living and dead, and might represent public charitable purposes within 6 & 7 Wm. 4, c. 84. O'Hagan, J., in the *Londonderry Case* (1), treats these purposes described under the charitable head as for the good of the public at large, and as a key to the construction of "public purposes," which he interprets in the same sense. As to graveyards, they were never rated till *Winstanley's Case* (2). In the Dublin Act, 1849, c. 97, the expression is "public charity." Does not "charitable" here imply the same thing? Neither church nor grave, mentioned before the special charitable purposes, connotes necessity of money help, and the former is sectarian. Neither is "occupied" in common parlance.

The argument that the general words relative to charitable purposes are not limited by the associated language, and that *Pemsel's Case* (3) supports such view, is disposed of by the nature and purpose of the enumeration and by the reference to public purposes, all of which would be useless and misleading if "charitable" had any such extensive operation. On the phraseology of sect. 63, *Scott's Case* (4) is a direct authority.

6 & 7 Vict. c. 32, like 13 & 14 Geo. 3, c. 19, is confined to rating in counties of cities and towns. It adopts the exemption language of sect. 63. If city exemption under this Act depended on pecuniary need, would that element have been excluded from county exemption under 6 & 7 Wm. 4, c. 84, using the same expression "charitable purposes"?

6 & 7 Vict. c. 36 adds a new exemption for science, literature, and art—matters connected with higher education and for the benefit of all without any regard to any poverty element.

(1) 1. R. 2 C. L., p. 585.

(2) [1910] A. C. 7.

(3) [1891] A. C. 531.

(4) [1892] 2 Q. B. 152.

K. B. Div. 9 & 10 Vict. c. 110 repealed the Act of 1836, with a stay till
 1914. the new valuation was completed. Section 9 recognizes Poor Law
O'NEILL in reference to city assessments, and sect. 43 repeats the old
v. formula of exemption. 12 & 13 Vict. c. 104, sect. 10 (as to Poor
COMM. OF Law), continues the former language as to "charitable purposes."
VALUATION.
COUNCIL OF Then comes the Dublin Act of 1849, c. 97, sect. 119, which
ALEXANDRA reproduces sect. 168 of the Towns Improvement Clauses Act,
COLLEGE 1847, c. 34, and exempts buildings exclusively used for public
AND SCHOOL worship (as in the Act of 1833, c. 30, the Act of 1838, sect. 63,
v. omits "public," its place being supplied by "dedicated," with the
SAME. same effect), or exclusively used for the gratuitous education of
Gibson, J. the poor or of *public charity*.

The course of legislation as a whole points to the conclusion that in 1852, as regards education, financial inability was conceived as a requisite to immunity. Beyond doubt such inability was then a condition for the purpose of poor law and city exemption.

The Act of 1852 creates a uniform valuation for the purpose of all public and local assessments and other rating; it defines the rateable hereditaments, adding to those in sect. 63 of the Poor Relief Act; gives exemption (like 6 & 7 Wm. 4, c. 84) to hereditaments exclusively used for charitable purposes—not merely to buildings so used; and (like 6 & 7 Wm. 4, c. 84) contains no limiting enumeration. Under sect. 46, till the new valuation is complete, county assessments may be made under the Poor Law Valuation, which might suggest that, as regarded exemption, the new valuation was not to be radically different from what existed in 1838.

But for the *Londonderry Bridge Case* (1) and *dicta* in other cases, which treat sect. 63 as in operation, I should be prepared to hold that the Act of 1852 superseded all antecedent enactments dealing with the same subject-matter, and that the reasoning in *Garnett v. Bradley* (2) was in point. If sect. 63 of the Act of 1838, and the special Dublin Act, 1849, c. 97, sect. 119, are still in force, the appeals before us would seem manifestly unsustainable.

(1) 1 I. R. 2 C. L. 577.

(2) 3 App. Cas. 944.

Assuming the previous statutes to be no longer effective, and to be only available as elucidating the legislation in its historical sequence and setting, I take up the three exemptions in the Act of 1852. "Public nature" has the same effect as "public purposes," and means that all the community are therein interested: the *Londonderry Case* (1), the *Limerick Case* (2); and not a class or a locality. But, in charity law, a public purpose may be charitable though it is confined to a locality or class: *Goodman v. Mayor of Saltash* (3), and cases mentioned by Lord Selborne at p. 642. The express specification of "public" in this sense of national would seem to negative an intention to include local or sectional public purposes as the subject of exemption under "charitable purposes." So, if scientific purposes are charitable, that type of charity cannot be embraced in the general words. The reasoning in *Scott's Case* (4) is more or less relevant, though the context of the Act of 1885, c. 51, sect. 11, sub-sects. 2 and 3, was different. It is to be noted that the statute was not a rating Act, and that it did not contain the term "exclusively."

As to this word "exclusively," no aid can be derived from the power of rating "portions" under the Act of 1854. Without any such provision distinct rating would have been probably competent: *Gambier v. Lydford* (5); *Shower's Case* (6). The effect of "exclusively" is largely influenced by the subject-matter. Under 6 & 7 Vict. c. 36 (where there is no eleemosynary note) it prohibits the admixture of any private or professional benefit. Compare the *Institution of Civil Engineers' Case* (7) (on this Act) with *Forrest's Case* (8) (on the Act of 1885, c. 51, sect. 11, which omits "exclusively") and the *Savoy Case* (9). In the Act of 1832 and statutes in operation when our present valuation code came into being, the expression may be directed to a wider object, and may limit immunity, in relation to such charities as hospitals and schools, to purely eleemosynary institutions. A school for boys without means or with small means, if frequented by pupils paying full value for

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(1) I. R. 2 C. L. 577.

(2) I. R. 6 C. L. 420.

(3) 7 A. C. 633.

(4) [1892] 2 Q. B. 152.

(5) 3 E. & B. 346.

(6) [1891] 1 Q. B. 339.

(7) 5 Q. B. D. 48.

(8) 15 A. C. 334.

(9) [1896] A. C. 296.

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their education, would lose its differential charitable character; the presence of such scholars might operate to the prejudice of their poor or free comrades. So of an hospital.

I think that the expression "charitable purposes" covers all purposes of charity within sect. 63 of the Act of 1838, including religious worship. Whether wider religious purposes may not be entitled to exemption I need not discuss. The Act of 1833, c. 30, and the Dublin Act, 1849, c. 97, only confer immunity in respect of public worship, and the earlier English decisions, with one exception which has been doubted, (apart from statute) go no further: *The Baptist Missionary Case* (1). I should be unwilling to impose the express limitations found in the Poor Law Act and similar enactments on "charitable purposes" on statutes where no such limiting context is found, though they may be useful as illustrations of the probable mind of the Legislature. In England, college and school chapels are rateable: Ryde on Rating, p. 150.

There are few English rating statutes with exemption, *e.g.*, (1833) c. 30, 6 & 7 Vict. c. 36; the Act of 1847, c. 34; and 32 & 33 Vict. c. 40 (Sunday and Ragged Schools). The most important rating enactment is 4 & 5 Vict. c. 48, which recognizes the immunity of corporation property supposed to have been established by decision, and expressly abolishes it, subject to an exception. *Reg. v. Oldham* (2) gave effect to this exception notwithstanding that the *Mersey Dock Case* (3) had overruled the decisions on which the statute was founded. This statute, with 1 & 2 Wm. 4, c. 51 (which made usage govern exemption), illustrates how judge-made law has affected legislation.

The four sets of general taxing statutes, the Inhabited House Duty Acts (the first, 48 Geo. 3, c. 55), Legacy Duty Acts (the first, 56 Geo. 3, c. 56), the Income Tax Act, and the Act of 1885, c. 51, sect. 11, contain exemption clauses, but they differ from our rating legislation in purpose, context, history, and absence of contemporaneous decisions, and none use the word "exclusively." Hence recent decisions as to hospitals with paying patients:

(1) 10 Q. B. 884, at pp. 894, 895.

(3) [1864] 11 H. L. C. 443.

(2) L. R. 3 Q. B. 474.

Cause's Case (1); the *Ormskirk Case* (2); as to public schools: *K. B. Div.*
Blake's Case (3); as to charity schools: the *Charterhouse Case* (4); 1914.
the *Holloway College Case* (5); cannot be safely used as guides.

The decisions on Income Tax and Legacy Duty Acts that religion was a charitable purpose were natural; religion without money and without price is for the good of all, and is essentially a branch of public charity.

Next, as to English rating decisions contemporaneous with our statutes. There is difficulty in applying them, as they were based on a wrong principle, and are often inconsistent with one another, varying as years went on. Their value consists in this, that at no period and no matter what line of thought prevailed, would such institutions as the Hostel and College have escaped liability.

Exemption was founded, not on charity or religion, but on non-occupation, or non-benefit from occupation. The result of the older authorities is stated in Nolan's Poor Law Act, 1825, vol. i, pp. 185-187, and in Pratt's Bott, ed. 1827, pp. 118 to 284 (where all the cases are summarized chronologically). A short account of the cases is given in Ryde on Rating, last ed., pp. 172, 173, 174.

The original conception was, that where there was no real occupation, as in case of hospitals and almshouses, the hereditament was not rateable. Later came the idea that if revenue was produced, liability attached: *R. v. St. Giles* (6), followed in *Sterry's Case* (7). This last case was explained by Lord Denman in the *St. George's Case* (8), as mainly based on the school being limited to the Society of Friends, and in no sense a *public* charity. In *Temple's Case* (9) Lord Campbell treats it as settled that, to warrant exemption, the purposes must be charitable in the ordinary acceptation of the word. The *Stapleton Case* (10), reverting to the original principle, decided that a purely eleemosynary but sectarian charity was not entitled to exemption, because it was of a *private* nature, and, therefore, there was a true occupier. In

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(1) [1891] 1 Q. B. 585.

(2) [1903] 2 K. B. 498.

(3) 19 Q. B. D. 79.

(4) 25 Q. B. D. 121.

(5) [1895] 2 Q. B. 487.

(6) [1832] 3 B. & Ad. 573.

(7) [1840] 12 A. & E. 84.

(8) 10 Q. B., at p. 866.

(9) 2 E. & B., at pp. 169, 170.

(10) [1863] 4 B. & S., at p. 639.

K. B. Div. the *Mersey Docks Case* (1) Byles, J., is emphatic that charities are exempt not *qua* charities, but because they are public charities, and there is no beneficial occupier save the public. Grose, J., had said the same thing in 1795 in *R. v. Catt* (2).

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The English authorities both as to public purposes and charitable purposes have been treated by our judges as relevant on the construction of our rating law. Our cases on "public purposes" give no aid, as income received for the purpose of the public trust does not affect the statutory protection.

As to charitable purposes in reference to education, the actual decisions are all against exemption. The *Magee College Case* (3) might be distinguished, but it was certainly based on *Sterry's Case* (4) and the *St. Giles Case* (5). The effect of the authorities is summarized by Holmes, J., in the *Cemeteries Case* (6); and Madden, J., in the *Cork College Case* (7) adopted the same view. Where income is earned by use of the hereditament, there must be occupation and profitable occupation. Whether such income is sufficient or not to pay expenses is immaterial: the *St. Thomas' Hospital Case* (8); and whether the necessary teachers are remunerated by salary or by fees may not be very important. The view taken by Holmes, J., and Madden, J., would be decisive against this appeal. The only apparent authority at all in favour of the appellants is the judgment of Kenny, J., in the *Cork College Case* (7), which was influenced by the opinions expressed in *Clancy's Case* (9) as to the supposed applicability of *Pemsel's Case* (10). His view is opposed to that of Madden, J., and the appeal decision was based on the public nature of the university, which, if a charity, was of a national character quite unlike the Hostel and College.

The *Welsh University College* (11) was of the same type; it was held charitable within *Pemsel's Case* (10), and to be exempt from income tax. It was of course rateable. The present point as to

(1) 11 H. L. C., at p. 485.

(2) 6 T. R. 332, at p. 334.

(3) I. R. 4 C. L. 438.

(4) [1840] 12 A. & E. 84.

(5) [1832] 3 B. & Ad. 573.

(6) [1897] 2 I. R. 157.

(7) [1911] 2 I. R. 593.

(8) L. R. 7 H. L. 477.

(9) [1911] 2 I. R. 173.

(10) [1891] A. C. 531.

(11) 100 L. T. N. S. 585.

exemption in our rating law being founded on an eleemosynary base has not been discussed in any case hitherto. K. B. Div.
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I remain of the opinion stated in *Clancy's Case* (1), that mere receipt of income from objects of the charity in respect of occupation is not *per se* and necessarily decisive against statutory exemption.

But in the institutions before us, the primary object (not incidental or accidental) is to benefit persons of a special limited class, whose qualification for admission is not financial inability but financial ability, and who give full value for the advantages, educational, disciplinary, moral, social and otherwise, offered and received.

I have dealt with the case mainly on the aspect that the phrase "charitable purposes" in our valuation system is, in relation to education, conditioned by pecuniary need. But the expression may be construed as describing charities of a public character for the good of the entire community, analogous to "public purposes" as understood and explained in the judgment of O'Hagan, J., in the *Londonderry Case* (2). As this latter view has not been discussed in argument, I give no final opinion on it. On either construction the appeal fails.

I can discover no instance in England or Ireland where such institutions as the Hostel or College were relieved from liability. Since 1832, when the present form of exemption first appears, to the present, such hereditaments have been always included in valuation. If "charitable," as argued, covers all the extensive varieties of religious and educational teaching and propaganda to which the Court gives effect—though they may seem to many mischievous, useless, or irrational: *Attorney-General v. Becher* (3)—the range of charitable exemption will be constantly enlarging under the movement of subjective convictions (decided by late cases to be the basis of charitable intent), and the rateable area will undergo ever-increasing diminution, to the injury of the remaining occupiers, compelled to submit to augmented contributions, and thereby indirectly to support what they may conscientiously

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(1) [1911] 2 I. R., at p. 187.

(2) I. R. 2 C. L. 585.

(3) [1910] 2 I. R. 251.

K. B. Div. object to, or even detest. The hardship is the more intolerable
 1914. where rich charities are relieved at the expense of humble folk,
O'NEILL ill able to meet the extra charge. Could "charitable" be
v. stretched to reach such a charity as *Goodman v. Mayor of*
COMM. OF *Saltash* (1)?
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COUNCIL OF The dangerous and novel extension now sought to be given
ALEXANDRA to rating exemption is not warranted by the language of the
COLLEGE code, authority, or practice. The Recorder's decision, stated in
AND SCHOOL his valuable judgment, was, in my opinion, right.
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MOLONY, J. :—

The question to be determined in this case is whether the University Hall is a tenement used exclusively for charitable purposes within the meaning of 17 Vict. c. 8, s. 2, as controlled by 15 & 16 Vict. c. 63, s. 16? It appears from the case which has been stated by the Recorder that the hall—[His lordship referred to the particulars as to the hall as set forth in the case stated above, p. 448.]

The hall is vested in the appellants as trustees under an indenture dated the 18th March, 1913, and made between the Rev. William Delany and the Rev. Peter Finlay of the one part, and the appellants of the other part. It was thereby agreed and declared that the appellants should hold the trust property upon trust to use the same for all or any of the eight following purposes. [His lordship read the objects of the foundation as set forth above, pp. 451, 452.]

It was also declared by the deed that the trustees should in their absolute discretion determine who should be deemed to be beneficiaries as above defined, and upon what terms and conditions as to payment or otherwise any person or persons should be admitted to participate in the benefits of the trust therein declared; and power was also given to the trustees to apply the surplus money remaining in their hands to, amongst other things, the extension to beneficiaries of limited or no means of the benefits of the trust, either free, or subject to diminished fees and pensions, and either by way of founding bursaries for this

purpose, or in such other manner as the trustees in their absolute discretion should think proper or desirable. K. B. Div.
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Mr. Ronan contended that the trusts are not exclusively charitable. He relied on the fact that the trustees hold the premises for all or any of the purposes mentioned, and submitted that the objects mentioned at 3, 7, and 8 were not charitable, and that the provisions in Clauses 2 and 3 may include objects which are not charitable. I am inclined to the opinion that under the deed the trust property could be applied to purposes which would not be deemed charitable purposes within the broad meaning which the Court of Chancery has given to the Statute 10 Chas. I, Sess. 3, chap. 1, Ireland; but I think that, in the view which we take of this case, it is unnecessary to decide the point.

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Under 17 Vict. c. 8, sect. 2, "all hereditaments and premises, or portions of same, of a public character, or used for charitable purposes, or for the purposes of science, literature, and the fine arts, as specified in 6 & 7 Vict. c. 36," are exempted from all assessment for the relief of the destitute poor in Ireland and for grand jury cess and county rates.

In *The Commissioners for Special Purposes of Income Tax v. Pemsel* (1), the House of Lords had to consider the effect of 5 & 6 Vict. c. 35, sect. 61, No. 6, Schedule "A," by which allowances were to be granted by the Income Tax Commissioners on the rents and profits of hereditaments "vested in trustees for charitable purposes so far as the same are applied to charitable purposes." The majority of the Court held that the words "charitable purposes" in the Act must be construed according to the legal and technical meaning given to these words by English law.

In the Income Tax Act there was no context which would modify the meaning of the words.

The case of *The Commissioners of Inland Revenue v. Scott* (2), which has been referred to by the Lord Chief Baron, shows that the strictly legal meaning of "charitable purposes" may be altered by the context.

(1) [1891] A. C. 531.

(2) [1892] 2 Q. B. 152.

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In the case of *The King v. The Special Commissioners of Income Tax, Ex parte University College of North Wales* (1), the Court of Appeal followed *Pemsel's Case* (2), and held that the property of the University College of North Wales was vested in trustees for charitable purposes.

In reference, however, to *Scott's Case* (3), Cozens Hardy, M.R., says (4):—"To my mind it is plain that it was impossible in the section of that Act to attribute the wide meaning of 'trust for charitable purposes,' which the House of Lords state those words would bear in the Income Tax Acts, and for the simple reason that the generality of the term 'for charitable purposes' would have been meaningless if placed, as it was, before and after special charitable purposes of a particular kind. Under these circumstances it was, I should have thought, reasonably obvious, as the Court of Appeal thought, that the narrower meaning must in that Act be given to the words 'for charitable purposes.'"

Under 17 Vict. c. 8, sect. 2, we have the words "for charitable purposes" placed before and after special charitable purposes of a particular kind, and, following *Scott's Case* (3), it is clear that the words cannot have their technical meaning, but must be construed in a narrower sense.

In order to understand the precise meaning and effect of the words, it is necessary to have regard to the earlier legislation, but the Lord Chief Baron and Mr. Justice Gibson have dealt so fully with all the statutes that it is unnecessary for me to do more than to say that I entirely concur in their conclusion that the words "charitable purposes" in 15 & 16 Vict. c. 63, sect. 15, and consequently in 17 & 18 Vict. c. 8, sect. 2, so far as they exempt from rating by reason of the user being educational, are limited to user for the education of the poor. It has also been considered by us, since the argument, whether the words "charitable purposes" are confined to charitable purposes applicable to the benefit of the community as a whole, or public charities. I wish to be free to consider this view when the matter has been fully argued, and I express no opinion at the present time.

(1) (1909) 78 L. J., K. B. 576.

(2) [1891] A. C. 532.

(3) [1892] 2 Q. B. 152, 163.

(4) 78 L. J., K. B., at p. 579.

I think the judgment of the Recorder was right, and should be affirmed. K. B. Div.
1914.

The Court answered in the negative the questions put in the two cases.

Solicitor for the Rev. George O'Neill: *Daniel Purcell.*

Solicitors for the Council of Alexandra College and School: *Richardson and Synnott.*

Solicitor for the Commissioner of Valuation: *Joseph Donnelly.*

Solicitor for the Corporation of Dublin: *Ignatius J. Rice.*

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June 24.

Local Government—Maintenance of roads—Direct labour scheme—Labourers employed by county council—Insurance contributions—"Expenses connected with any public work in the district"—District charges—Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), s. 44—Local Government (Procedure of Councils) Order, 1899, as amended by the Local Government (Procedure of Councils) Order, 1901, confirmed by 1 Edw. 7, c. cxli, Art. 25A—National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), ss. 3 & 4.

Contributions payable by county councils under the National Insurance Act, in respect of labourers employed by them on the maintenance of roads under direct labour schemes, are, so far as the employers' share thereof is concerned, "expenses connected with any public work in the district," within the meaning of sect. 44 of the Local Government (Ireland) Act, 1898, and are, where the roads are not main roads, exclusively a district and not a county-at-large charge.

CERTIORARI.

The Cork County Council had adopted very generally throughout the county the system of maintaining the public roads of the county by direct labour under Article 25A of the Local Government (Procedure of Councils) Order, 1899, as amended by the Local Government (Procedure of Councils) Order, 1901, confirmed by 1 Edw. 7, c. cxli. Schemes under the said article had

(1) Before PALLES, C.B., and GIBSON, J.

K. B. Div. been formulated in respect of a number of roads, and these roads
 1914. were being maintained under the system of direct labour. It was
 REX necessary under these schemes to employ a great number of
 (Co. Council necessary labourers for the maintenance of the roads. These labourers were
 of Cork) employed by the day, and their wages were paid by the county
 v. council. The wages paid to each labourer were charged against
 SHEEHAN. the particular section of roads in which he was employed, as part
 of the expenses of the maintenance of such roads, and the entire
 of such expenses was charged to and borne by the rural district in
 which such roads were situate, or one moiety of such expenses was
 charged to and borne by the rural district, and the other moiety
 by the county at large, according as the particular roads were
 district roads or main roads within the meaning of sect. 8 of the
 Local Government (Ireland) Act, 1898. All the roads to which
 the scheme in the present case related were district roads.

Under sects. 3 and 4 of the National Insurance Act, 1911, contributions had to be paid by the county council in respect of each labourer employed as abovementioned, and the council treated the employers' portion of these contributions as part of the expenses of the maintenance of such roads, and under sect. 44 of the Local Government (Ireland) Act, 1898, charged the contributions equally over the whole rural district. For the half year ended September, 1913, the amount so charged as expenditure on roads against the rural districts was £225 5s. 9d.

The Local Government Board for Ireland had been advised that the contributions of the council, as the employer under the National Insurance Act, 1911, was a county-at-large charge. In auditing the accounts of the county council for the half year ended September 30th, 1913, Mr. D. B. Sheehan, Local Government Board Auditor, adopting this view, disallowed and struck out of the accounts of the several rural districts involved the respective sums therein mentioned as employers' share of the contributions under the National Insurance Act, and required that the total of these sums should be charged to the county at large.

The present application was by the county council for a writ of certiorari to quash the certificate of the auditor.

Conner, K.C. (with him *Henry, K.C.*, and *T. Sullivan*), for the *K. B. Div.*
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and the employers' share of the contributions payable under the National Insurance Act. The wages are admitted to be a district charge, and the contributions should be similarly treated. If the maintenance of the roads in question had not been carried out by the direct labour system, admittedly no contributions under the National Insurance Act would have become payable by the county council. Throughout the county there are many districts in which the roads are maintained under the contract system, and it would manifestly be inequitable that the ratepayers in these districts should be called upon to bear portion of the expenses of maintaining roads in other districts which are not main roads, simply because in respect of these other districts direct labour schemes have been adopted. [As to the procedure with reference to the maintenance of roads, he referred to : Local Government (Ireland) Act, 1898, sects. 8 (1) and 44 ; the Local Government (Procedure of Councils) Order, 1899, as amended by the Local Government (Procedure of Councils) Order, 1901, Articles 5, 6, 7, 14, 16, 18, 22, 25 (A), and 27, and Local Government Board (Ireland) Provisional Order Confirmation (No. 3) Act, 1901 (1 Edw. 7, c. clxi).] Under Article 17 of the Local Government (Application of Enactments) Order, 1898, the county council shall keep such accounts as will prevent the whole county from being charged with expenditure properly payable by a portion only of the county. The accounts in question here comply strictly with that article.

The Solicitor-General (Jonathan Pim, K.C.) (with him *Henry, K.C.*, and *Gerald Dougherty*), for the Local Government Board :—

Contributions payable under the National Insurance Act are an Imperial tax which must be paid by the employer, and where the council of a county undertake the maintenance of roads by direct labour they are employers within the meaning of the Act. They must, therefore, pay, and the contributions cannot be treated as "expenses connected with any public work" (Local Govern-

K. B. Div. ment (Ireland) Act, 1898, sect. 44) in a rural district. As a matter
 1914. of practice it would be impossible to distribute these contributions
 REX proportionately amongst the various district councils, inasmuch as
 (Co. COUNCIL OF CORK) the labourers may one day be employed in one district, and
 v. another day in another district.
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Wylie, for the Auditor.

Sullivan, in reply.

PALLES, C. B. :—

This case comes before us upon an application for a writ of certiorari to bring up with a view to its being quashed a certificate made by the defendant, an auditor of the Local Government Board, disallowing certain charges in the accounts of the county of Cork. The ground of disallowance was that the charges in question ought to have been made against the county council and not against certain rural district councils. Those councils were councils in whose districts a scheme for direct labour had been adopted under the Act of 1901. The Local Government Act makes it quite clear how expenses in respect of roads in rural districts should be charged. Sect. 44 of the statute of 1898 enacts :—

“Notwithstanding anything in any Act, all expenses incurred in relation to the business of the council of a rural district, including those expenses connected with any public work in the district which are not leviable off the county at large, shall, subject to the provisions of this Act with respect to excluded charges, be raised equally over the whole district, and shall be called district charges.”

No question arises as to any excluded charge; and the general provision in respect of roads—which are the works we are dealing with here—is that the expense of main roads shall be borne half and half by the county council and the rural district council; and that the expense of roads which are not main roads shall be borne wholly by the rural district council. All the roads to which this case relates are of the latter type; and taking the expenses incident to these roads prior to the passing of the National Insurance Act, those provisions seem to have been carried out

accurately in the county of Cork. The same course of practice continued to exist after the passing of the National Insurance Act, which imposed this tax of $2\frac{1}{2}d.$ a week upon the county council in respect of each labourer employed by them. The Local Government (Application of Enactments) Order, 1898, provides that proper accounts shall be kept showing what part of the expenses are appropriated, and should be charged, against the county council, and what part should be charged as against the district councils. Article 17 of the Order to which I have just referred states:—"The county council shall keep such accounts as will prevent the whole county from being charged with expenditure properly payable by a portion only of the county, and will prevent any sums raised in a portion only of the county being applied in reduction of expenditure properly payable by the whole or a larger part of the county." One object of this provision is to prevent the whole county from being charged with expenses which ought to be borne by a rural district which is portion only of a county. The practice prescribed by Article 17 prevailed in the county of Cork until the National Insurance Act came into operation; and, according to the affidavit of the secretary of the county council, the council appears to have continued it since.

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The question before us arises in reference to the employers' contributions under the Insurance Act; they amount to the considerable sum of £225 5s. 9d., and there is no objection to them as a matter of account. The secretary of the county council says, in substance, that the charges in reference to the National Insurance Act were treated from time to time as part of the expenses of maintaining the particular roads, and, accordingly, were charged against the rural district councils. The accounts were presented to the auditor in that shape, and he—I do not blame him at all, because he was acting under legal advice—took a different view of the construction of the Local Government Act; he came to the conclusion that those sums that were paid for insurance ought to be charged against the county council, and not against the rural district councils, and, accordingly, he disallowed all the sums, amounting to £225 5s. 9d.

K. B. Div. The present application is to bring up that surcharge in
 1914. order that it may be disallowed. In these circumstances it is
 REX quite clear that the only question that we have to decide is
 (Co. COUNCIL whether those sums payable as contributions under the Insurance
 OF CORK) Act are within section 44 of the Local Government Act, and
 v. are comprehended in the phrase, "including those expenses
 SHEEHAN. connected with any public work in the district which are not
 Palles, C.B. leviabie off the county at large." There is nothing in the Act
 which deals with insurance expenses. Then we have to construe
 the words "those expenses connected with any public work in
 the district." As regards the contributions or expenses under
 the Insurance Act, in ordinary circumstances when a sum of
 money is payable by an employed person under a contract he,
 of course, takes that into consideration in fixing the amount
 of his contract, so that ultimately the burden is borne by the
 person for whom the work is done. There is, in this case, a
 contract of employment between the county council and the
 labourers employed on these roads. The employers are bound
 to pay the contributions under the Insurance Act, and it would
 be illegal not to stamp the labourers' cards. It appears to me
 that the position is the same as if the Act declared that a contract
 shall not be entered into except it bears a stamp representing a
 certain sum of money. I attribute the same character to stamps
 which have to be affixed to the insurance cards of these labourers
 as I do to a stamp which has to be paid for and affixed to the
 document constituting the contract in order to make the
 performance of the contract enforceable; and, therefore, in my
 opinion, it is quite clear that these various sums paid under the
 National Insurance Act are "expenses connected with" a "public
 work in the district which are not leviabie off the county at
 large." Upon that short ground I am of opinion that the action
 of the Cork County Council was right; that the action of the
 auditor in disallowing the charges was wrong; and that, con-
 sequently, the certiorari must go, and these surcharges must be
 disallowed.

The Solicitor-General appears to entertain a strong opinion
 the other way; and I am glad he will have an opportunity
 of testing this case by taking it to the Court of Appeal.

With reference to the costs, to a certain extent there is an embarrassment in the way the case comes before us. The Cork County Council, which succeed, must, of course, get their costs; but they can only get them out of the general rates; the auditor must get his costs under the Act, and he must get them out of the general rates; and the Local Government Board will abide their own costs.

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GIBSON, J., concurred.

Solicitors for the county council: *T. Exham & Sons.*

Solicitors for the Local Government Board: *T. T. Mccredy & Son.*

Solicitors for the auditor: *M. J. Horgan & Sons.*

C. L.

O'NEILL v. DROHAN AND THE WATERFORD COUNTY COUNCIL (1).

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Local Government—Rate—County Council—Invalid Rate—Distress—
Liability of rate collector—Liability of county council—Master and
servant. May 5, 6, 18.

Where a county council issues a warrant to a rate collector authorizing and directing him to levy a rate which is invalid, and the rate collector, in pursuance of the warrant, levies the rate by distress, in such manner that the distress would have been lawful had the rate been valid, the county council, as well as the rate collector, is liable to an action for damages in respect of the illegal seizure.

So *held*, by O'Brien, L.C., and Palles, C.B.; Holmes, L.J., inclining to the same opinion.

But *held*, that the decision of the King's Bench Division (*ante*, p. 41), dismissing the action as against the county council, should be affirmed on the ground that at the trial no evidence had been given of the issue of the warrant by them.

This was an appeal by the plaintiff from so much of the judgment of the King's Bench Division (reported, *ante*, p. 41, where the facts are stated) as dismissed the action as against the county council. There was no appeal by the defendant, Drohan, against

(1) Before O'BRIEN, L.C., PALLES, C.B., and HOLMES, L.J.

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the judgment entered against him. During the argument in the Court of Appeal the Court required the production by the county council of the warrant issued by them to Drohan, and it was produced.

Serjeant M'Sweeney, K.C., Norwood, K.C., and Arthur Coughlan
for the appellant :—

We submit that the action should not have been dismissed as against the county council. No doubt if the levy had been wrongly made the council might not be liable ; here, however, the levy was properly made, but the rate was bad : *Guardians of New Ross Union v. Byrne* (1). That being so, apart from any question of the existence of the relationship of master and servant, the council should be held liable for the trespass committed by Drohan ; they authorized the wrong and set it in motion, and the maxim applies, *qui facit per alium facit per se*. Prior to the Local Government (Ireland) Act, 1898, the business of making and levying rates was carried out by the guardians of unions, who were empowered by sect. 73 of the Poor Relief (Ireland) Act, 1838, to issue warrants under their seal to each collector, specifying the amount of money to be levied for the purposes of the Act on each electoral division, and the portion thereof to be paid by each occupier of rateable hereditaments or other person liable to pay the same, and the collector, on receipt of said warrant, was thereby required and authorized to levy the money therein mentioned according thereto. By sect. 6 of the Local Government Act, 1898, this business of the guardians was transferred to the county councils, and the form of the warrant now in use is Form 50 in the Schedule to the Public Bodies Order, 1904. By this warrant the collector is authorized and directed to levy the rates and arrears of rates set forth in the annexed collecting-book of receipt and demand notes from the several persons liable to pay the same, by all such ways and means as by law the collector is empowered to use, and the warrant is sealed with the common seal of the council and signed on behalf of the council. Even if the collector be not a servant of the council, how can it be said that a warrant in this form is not a direct authorization by the

council to the collector directing him to levy the rates set forth in the collecting-book? The power to levy includes a power to distrain under sect. 152 of the Grand Jury (Ireland) Act, 1836.

The collector is appointed by the county council (Article 82 of the Public Bodies Order, 1904); he is required to give a bond to the council for the due and faithful performance of his duties (Article 87), which amounts to a contract between him and the council; under Article 89 the council may suspend him, and under Article 90, on the making of a poor-rate by the council, the secretary or clerk prepares for each collector the collecting-book, and issues it to him with the warrant for the collection of the rate. Accordingly, in the present case, Drohan, if not, strictly speaking, the servant of the council, was at least their agent, and the particular acts complained of were done by him under the authority and direction of the council; the latter, having directed the trespass, must be liable. See judgment of Jessel, M.R., in *Smith v. Keal* (1); *The Mersey Docks Trustees v. Gibbs* (2).

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H. D. Conner, K.C., and Timothy Sullivan, for the respondents:—

1. There was no evidence at the trial of any wrongful act by the council; the warrant and collecting-book alleged to have been given by them to Drohan were not in evidence, and there is nothing to implicate the council. They were not bound to produce the warrant; it was in Drohan's possession, not in that of the council, and Drohan was not their servant. We rely on our requisition for a direction made at the trial, which should have been complied with.

2. There is no cause of action against the council. Drohan was in the position of the former collectors of grand jury cess, who were empowered to distrain under sect. 152 of the Grand Jury Act, 1836; it was never suggested that in the case of an illegal distress by such a collector his employers were liable. [Norwood, K.C., referred to *Rush v. Roscommon Union* (3).] There the guardians themselves brought about the distress. Here the council not only did not do so, but they could not have prevented

(1) 9 Q. B. D. 340, at 351.

(2) L. R. 1 H. L. 93.

(3) 3 L. C. L. R. 14.

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the rate collector from distraining. They could not regulate his conduct; if he chose to distrain, instead of applying to the justices under sect. 152 of the Grand Jury Act, 1836, as he should have done, the council could not intervene. He was an independent officer, and clearly not a servant of the council. See sections 31, 32, 33, and 73 of 1 & 2 Vict. c. 56, and sect. 13 of 25 & 26 Vict. c. 83; sub-sect. 5 of sect. 83 and sub-sects. 10 and 18 of sect. 115 of the Local Government (Ireland) Act, 1898; County Poor Rate Collectors Order, 17th April, 1899, Articles 4 and 13; Public Bodies' Order, 1904, Articles 82 to 93. The county council were not responsible for the invalidity of the rate in question; in striking the rates they have to act on the valuation lists sent down to them by the Commissioner of Valuation: *Queen v. Commissioner of Valuation* (1); sections 17-27 of the Valuation Act, 1852, and clause 37 of the Privy Council Order of 30th January, 1899 (Adaptation of Irish Enactments). By the concluding words of sect. 26 of the Valuation Act, 1852, it was provided that nothing therein contained should be construed to prevent the treasurer of a county from altering the name of any occupier in case of change of abode or possession, or in case of any error or omission of, or in the name of the occupier; but this was repealed by the Statute Law Revision Act, 1875. Sect. 6 of 23 & 24 Vict. c. 4 provides that no alteration is to be made in any list, or in the name of any occupier or lessor, save by the Commissioner of Valuation, or some person duly authorized by him for that purpose, or by a court of competent jurisdiction. Under sect. 4 of the Valuation (Ireland) Act, 1854, it was the duty of the collector of poor rate to make out lists of all the tenements or hereditaments the valuation of which requires revision. The council has no power to correct the lists they receive from the Commissioner of Valuation, nor has it any means of doing so. The council does not know, and has no means of knowing, whether or not a rated occupier is alive or dead, or whether he has left the rated premises. It has no officials to deal with these questions of revision, and it would involve great hardship if the liability suggested in this action should be

(1) [1901] 2 I. R. 215, at p. 231.

attached to an unpaid body, carrying out ministerial duties, such as a county council. Appeal.
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[They referred to *Brennan v. Limerick Guardians* (1); *Dunbar v. Ardee Union* (2); *Tozeland v. Guardians of West Ham* (3); *Doran v. Waterford Guardians* (4); *Murphy v. Enniscorthy Union* (5); *Switzer & Co. v. Commissioner of Valuation* (6).] O'NEILL
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Norwood, K.C., in reply :—

The duty of the council was to make a valid rate; and they cannot rely on an error in the lists of the Commissioner of Valuation, as under sect. 6 of 23 Vict. c. 4 they are empowered to make such departure, not affecting value, from the particulars contained in the lists, as may be necessary, at the time of making the rate, to enable them to make a valid rate.

Cur. adv. vult.

O'BRIEN, L.C. :—

May 18.

As the facts appear fully in the printed report of the case, it is unnecessary to repeat them.

When the rate in respect of which the seizure complained of was struck, all the premises, both land and house, were unoccupied. The county council did not use the powers given by statute 25 & 26 Vict. c. 83, s. 12, specially to mark them empty. It is not necessary to inquire whether or not they had the materials for or could have done so. Having regard to the case of the *Guardians of the New Ross Union v. Byrne* (7), which is admitted to be good law, it would make no difference so far as the validity of this rate is concerned.

A rate made in respect of premises which at the date of assessment are in fact unoccupied is made absolutely without jurisdiction, and accordingly this rate was made without jurisdiction, and was bad.

It is true that a rate has to be made in accordance with the

(1) 2 L. R. Ir. 42.

(2) [1897] 2 I. R. 76.

(3) [1907] 1 K. B. 920.

(4) 27 I. L. T. R. 158.

(5) [1908] 2 I. R. 609.

(6) [1902] 2 I. R. 275.

(7) 30 L. R. Ir. 160.

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valuation lists as sent by the Commissioner of Valuation to the county council, and these, in fact, contain the names of occupiers ; but it is expressly provided that "for the purpose of any poor rate the council . . . may make such departure, not affecting value, from the particulars contained in the said list, as may be necessary, at the time of making the rate, to enable them to make a valid rating under the laws in force for the relief of the destitute poor in Ireland " (23 Vict. c. 4, sect. 6).

As the county council are bound to strike a valid rate, and as it cannot be a valid rate in a case like the present where no one was in occupation at the date of the assessment, I think they are bound to disregard what they may find in the valuation list in respect of a mere matter of name, because it is their duty to make a valid rating.

When the county council has struck a rate, they are undoubtedly bound to issue to the collector a warrant to collect it by all such ways and means as by law he is empowered to use in the levying of rates, and they have done so in this case ; but if there is no jurisdiction to make the rate, the warrant certainly gives no power to the collector to levy it.

It was much debated in the Court below whether the rate collector is the servant of the council. The Court held that he was not, and I entirely concur in their view that he is an independent officer, and not the servant of the county council ; but this does not appear to me to conclude the question.

If this were a good rate, made within jurisdiction, the county council would, if we might suppose an action brought against them, be free from liability, by reason of the rate being a legal one. I think the converse is true, and that when such proceedings are taken, and it appears that the rate is illegal and made without jurisdiction, they are liable, and cannot evade liability because the independent officer whom they have set in motion has obeyed their warrant by levying the rate, which levy would be perfectly legal if the rate were itself legal.

The argument was strongly pressed that the collector ought not to have distrained, and that if he had proceeded by some other process no trespass would have been committed. Accordingly, it is said the act is his tortious act alone.

I fail to appreciate this argument. If a collector happens to know that a rate is certainly illegal, he might be justified in not enforcing it, but it is no part of his general duty to turn himself into a commission of inquiry into the acts of the county council and their legality. He receives a warrant to collect a rate legal on the face of it. His duty is to collect it, if it is legal. There is no evidence in the present case to show that he knew or suspected that it was illegal by reason of want of jurisdiction, and he did nothing irregular in the course of the levy. My difficulty is to see on what principle the county council should not be liable.

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It is said that this imposes an undue and unfair liability on county councils. I can see no hardship in requiring a corporation to do its duty, and in making them liable for damages if they neglect their duty as prescribed by the statute.

I am accordingly of opinion that the plaintiffs would have been entitled to recover damages against the county council.

Another question, and a serious one for the plaintiff, remains. At the trial the plaintiff, who had served "notice to produce," called on the defendants for the production of the rate-books, warrant, and other documents necessary to connect the act of the rate collector with the county council. These documents were not in fact produced, nor was any evidence given of them, nor any adjournment asked for. Counsel for the county council asked the judge to direct for them, partly on the grounds which have been discussed here and in the Court below, and one of the requisitions did properly take advantage of the absence of evidence. In an alternative defence of the county council they had referred to the documents which, if produced, would have established the plaintiff's case, and counsel for the collector made a requisition for a direction based on the fact, as he alleged, that he was only acting under the directions of the county council. The learned judge did not accede to any requisition, but reserved leave for the parties to move for judgment. The case appears to have been heard when the assizes were closing, and there was the usual hurry incidental to such a situation, but the strict letter of his right was not overlooked by the astute counsel for the county authority. I think it may have been generally thought that all

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questions would be open in the Court above, but the fact undoubtedly remains that according to the strict and technical rules which prevail at *Nisi Prius*, and which, as a general rule, are essential to the proper conduct of business, judgment ought to have been entered at the trial for the county council. It might be difficult to make a layman understand that when all the documents relating to the matter were public documents, the text of which was not liable to variation, so far as the necessary procedure was concerned—when the actual documents were in the custody of some of the defendants, all of whom had come to Court to try a definite issue—this should be the result. Rules, however, are made for the convenience of all litigants, and occasionally may work harshly in individual cases. When the case came before the Court of Appeal, production of the necessary documents was compelled by enforcement also of a technical rule, namely, that being referred to in the pleadings they could be called for at any time.

The production of those documents shows that plaintiff might have recovered against the county council if the documents had been available at the trial, and I think we have jurisdiction to direct a new trial; but the plaintiff did not ask for it in his notice of motion, nor would it be any use to him, because it could only be given, having regard to the requisitions properly made, on the terms of his paying the costs of the trial; and, as far as I can see, this would re-open every question in the action, including the question of damages. In the exercise of its discretion, I think the Court ought not to give a new trial, and that the judgment entered for the plaintiff against the rate collector, Drohan, with costs of the trial, and of the new trial motion, and the judgment directed to be entered for the county council, should be affirmed.

In my judgment, however, under the peculiar circumstances of this appeal, and as the plaintiff has succeeded in the main question argued before us and in the Court below, the costs of the appeal ought to be paid by the county council to the plaintiff, and the plaintiff and the county council ought to bear their own costs of the argument in the King's Bench Division.

HOLMES, L.J. :—

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The circumstances which led to this action may be briefly stated. O'NEILL

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The plaintiff became tenant of an unfurnished house situated in Bonmahon, county Waterford, for six weeks from the 6th August, 1912; and, on the 13th September following, the defendant Drohan, in the plaintiff's absence, called at the house.

He demanded from Mrs. O'Neill payment of £1 11s. 6d. for rates, and after a short conversation he seized and carried away a suit of clothes, a waterproof coat, and a Gladstone bag. It is admitted in the statement of claim that Drohan is a rate collector in the employment of the county council, and there is no doubt that he demanded payment of the £1 11s. 6d. as rates; but beyond this, I can find in the judge's notes no evidence, affecting the plaintiff or the county council, that the premises in which the seizure took place were rated at all. A witness called William Qually proved that he was the landlord of the house, and that in the previous summer he had paid the rates. We have also been told that a demand note had been served by Drohan on Qually, and that the solicitors of both defendants were asked to produce the warrant and rate-book, but that they did not do so.

Such was the state of the case when the plaintiff's evidence closed, whereupon Mr. Conner handed in a requisition asking the judge to direct a verdict for the county council on several grounds, the first of which was that there was no evidence of any illegal act on their part. No witness was examined on behalf of either of the defendants; but Drohan's counsel asked for a direction on the ground that Drohan, at the time of the trespass, was discharging a duty imposed on him by statute—the duty of collecting the rate made by the county council—and that he was under no liability for acts done by him when carrying out this duty.

Upon the evidence as it stood, however, he was a trespasser, and his co-defendants had no connection with his acts. In these circumstances the usual, and I think the proper, course would have been, in the absence of the production of further evidence or of an application for an adjournment to enable this to be given, to have directed a verdict for the plaintiff against Drohan for a

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sum to be assessed by the jury, and a verdict for the county council against the plaintiff. Judgments would then have been given pursuant to such verdicts, and the action would thus be put an end to. But although the judge had the amount of damages found by the jury, he directed no verdict and gave no judgment. I do not understand why he took this course. He seems to say in his notes that it was because the question of the liability of the defendants or either of them was a question of law to be determined by the Court; but no question of law could have arisen from the only facts proved. What occurred at the trial having thus left it to the Divisional Court to dispose of the action, the plaintiff applied thereto for a judgment against the defendants for £30, the sum found by the jury; and when this motion came on for hearing the case seems to have been precisely in the same position as when it left the assizes. I would gather that Drohan's counsel saw that there must be a judgment against their client, and Mr. Justice Kenny says that they admitted that the assessment was made on the basis that the premises were then occupied, while in fact they were empty. This admission did not, however, affect the county council; and no further attempt was made to show that they were responsible for the rate collector's trespass. Indeed I do not see how this could have been done, inasmuch as, in an action tried by a jury, it was too late for the Court to receive additional evidence. Mr. Conner, for the county council, relied just as strongly as he did at the trial on his requisition that there was no evidence of any illegal act on the part of his clients; and if he had confined himself to this defence, the hearing would have been soon over and the Court would have given the judgments which I think Boyd, J., ought to have given at the trial.

How, then, did it happen that the case after being at hearing for two days was adjourned to enable the judges to give written judgments? I am afraid that Mr. Conner is to a great extent responsible for this; for while he continued to rely on the absence of evidence, he seems to have argued strenuously in the alternative that, even if the facts as stated by the plaintiff were accepted, the county council would be entitled to judgment. The following are the facts:—The premises had been for some time in the occupation of a person named Illingworth, and were then I presume duly

rated; but this tenant died in May, 1910, and William Duggan became occupier. He left them in July, 1911, and they were vacant when the county council struck the rate on the 21st May, 1912. As the law now stands, under the Poor Relief (Ireland) Act, 1862, sect. 12, a valid rate may be struck on unoccupied buildings, but the rating authority is directed to describe, in the column appropriated to the name of the occupier, the building as empty. The result of this is that if the building remains unoccupied during the whole period for which the rate was struck, the rate would not be recoverable, but a person subsequently entering into possession would be liable for a part of the rate proportioned to the time of his occupation.

The county council assessed the rate imposed in May, 1912, on the premises, naming Illingworth as occupier, and not describing the building as empty. The consequence of this was that the rate was illegal, and that, therefore, Drohan's distress was a trespass. The judges in the Divisional Court have referred to the statutes and authorities on this point, and I have nothing to add thereto. They have also fully considered the proposition, apparently relied on by plaintiff's counsel, that the rate collector is a servant of the county council, and that, therefore, the doctrine of *respondeat superior* applies. I adopt all that Kenny, J., has said in opposition to this argument. There are many illegal acts of the rate collector for which the county council would be liable if he were their servant, for which they could not be sued. For example, if the rate under consideration had been struck pursuant to the statute, and the collector from ignorance or rashness had distrained for it, the council would have been under no liability. But there are other grounds upon which corporations or individuals may be held responsible for wrongs in which they did not actively participate, and I think the present cause of action is of that character. It was the duty of the county council when striking a rate to describe these premises as empty. It might be argued that if they were occupied the county council were at liberty to use in the rate-book the description, even if erroneous, appearing in the revised list supplied by the valuation office. I offer no opinion upon this point; but there is no doubt that where the premises are empty the county council are guilty of a breach of duty if this

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Appeal. is not stated in the rate-book, which is given with the warrant
 1914. directing the rate collector to collect the rates assessed therein.

O'NEILL *v.* Of course he is under no obligation to levy an illegal rate, and if

DROGHAN AND he does so by distress he commits a trespass. Still, what I may call
 WATERFORD the origin or foundation of the wrong done the plaintiff was the
 Co. COUNCIL. breach of duty on the part of the council, and, were it not for the

Holmes, L.J.

want of evidence, I would probably have held that both defendants were responsible for the trespass complained of. As the case stands, however, I am clearly of opinion that when the trial ended before Boyd, J., the county council was entitled to judgment against the plaintiff, and that nothing occurred in the Divisional Court, or in this appeal, to deprive that body of this right. It has been suggested during the argument that even at this stage we might give the plaintiff an opportunity to give the necessary evidence. There have been some occasions on which, where an action has been tried by a judge, we have allowed proof to be given of some formal matter that had been overlooked, but instances of this have been rare, and have never occurred in jury cases, nor do I think that, even if we had jurisdiction to do so, which I doubt, it ought to be exercised. I can understand that this rule might, in an exceptional case, lead to great injustice; but there is a remedy which has been once or twice adopted, namely, to grant a new trial subject to terms. This, however, is not the class of case in which such a course could be thought of. It might, and indeed in my opinion ought to, have been brought by civil bill; and to send it back for a second trial in the superior courts would be oppressive to all the parties.

I, therefore, concur in the judgment pronounced by the Lord Chancellor, including so much thereof as relates to the incidence of costs.

PALLES, C. B.:—

The house, which was part of the rateable hereditament, being unoccupied at the time the rate was made, and the power (under 1 & 2 Vict. c. 56, sect. 61) being to rate the occupier, not the hereditament, the only legal mode for the council to have made a rate in respect of the house was under 25 & 26 Vict. c. 83, sect. 12. Not having made sufficient enquiries as to the occupa-

tion of the house, they treated it as occupied, and accordingly, although the house was vacant, rated a former occupier named in the valuation lists, but who in fact was dead.

The Guardians of New Ross Union v. Byrne (1) decides that such a rate is without jurisdiction and wholly void, and it has not been contended by the defendants' counsel that the rate in question here is not within that decision, and void.

The defendants, the council, by their warrant, *authorize and direct* the defendant, Drohan, to levy this particular rate on this particular hereditament. It is set forth in the Collecting Book of receipts and demand notes annexed to the warrant, and the direction is to levy it "from the several persons liable to pay the same, so long as the same remains due and payable, by all such ways and means as by law you are empowered to use in the levying of the said rates"—words which must be read as if the rate were, as on its face it is, regular and legal.

One of such ways and means is by the distress and sale of goods found on the premises described as rateable: 1 & 2 Vict. c. 56, sect. 73; 6 & 7 Wm. 4, c. 116, sect. 152; 6 & 7 Vict. c. 92, sect. 2.

There is, therefore, a direction by the defendants, the council, to levy for them this void rate by such of certain means as he may select, which include distress. A distress is levied accordingly, and I cannot doubt that such levying was a trespass by the defendant Drohan, who levied it; and, unless there is something special in the character of the defendants the council, exonerating them, a trespass by them also, as Drohan's act in distraining was within the scope of the direction given to him by the council. Whether there is anything exonerating them in the character of the council in respect of such a matter is the question for decision.

As to it, I have to observe: (1) That the act of making this void rate was the act of the council themselves, not that of any of their subordinate officers, and that the making of it in the form they adopted was a distinct breach of a statutable authority vested in them personally. (2) That they were not authorized by the valuation lists which they received from the General Valuation Office either to make the rate in the form they adopted or to depart

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from the statutable direction contained in the 25th & 26th Vict. c. 83, sect. 12. The proviso at the foot of section 6 of the Annual Revision Act, 1860 (23 & 24 Vict. c. 4), expressly authorizes the Council, for the purpose of any poor-rate, "to make such departure, not affecting value, from the particulars contained in the lists as may be necessary, at the time of making the rate, to enable them to make a valid rating." (3) That we cannot enter upon or entertain any such question as was suggested as to the council having an insufficient number of subordinate officers to enable them to carry out their statutable duties. They have power to appoint officers, with the consent of the Local Government Board; and an insufficiency of officers, if it in fact exists, is no answer to a person injuriously affected by the non-performance of their statutable duties.

Is there then anything special in the position of the council which excuses them from the ordinary consequences of a breach of a statutable duty which results in an injurious act on a third party committed by their direction?

This question is dealt with somewhat summarily in the Court below.

The learned judges there decided in the first instance that the relation of master and servant did not exist between the council and Drohan. In this conclusion I entirely agree, and this shows that they are not liable for what has been called the collateral negligence of Drohan; but Mr. Justice Kenny decides that neither does the relation of principal and agent subsist between them, and, having referred to *Brennan v. The Guardians of the Limerick Union* (1), and *Dunbar v. The Guardians of the Ardee Union* (2), both of which he rightly says were approved of and followed in *Tozeland v. Guardians of West Ham* (3), he holds that the doctrine of *respondet superior* does not apply.

All of these cases are undoubtedly good law, but their application to the present case raises an interesting question.

I commence by referring to a decision of our Exchequer Chamber which was not cited below—*Levingston v. Guardians of Lurgan Union* (4). That was an action against a board of

(1) 2 L. R. Ir. 42.

(2) [1897] 2 I. R. 76.

(3) [1907] 1 K. B. 920.

(4) I. R. 2 C. L. 202.

guardians for injury caused to the plaintiff's premises by the guardians making a sewer, and discharging sewage matter into a stream to the use of which the plaintiff was entitled. On general demurrer it was held by the Common Pleas that the action was not maintainable against the guardians in their corporate capacity, because according to *Coe v. Wise* (1), persons with a public duty, discharging it gratuitously, themselves taking no personal part in its performance, and having no funds at their disposal out of which compensation for injury arising from the negligent acts of the persons employed by them can be made, are exempted from liability in respect of such negligence.

In the interval between the judgment of the Common Pleas and the hearing of the writ of error in *Levingston v. Guardians of Lurgan Union* (2), *Coe v. Wise* (1) had been reversed on appeal by the Exchequer Chamber (3), in accordance with the judgment of the House of Lords in *The Mersey Docks Trustees v. Gibbs* (4). The judgment of the Common Pleas in *Levingston v. Guardians of Lurgan Union* (2) was accordingly reversed.

This case is distinguished by Fitzgerald, J., in *Brennan v. Guardians of Limerick Union* (5), upon the ground that in the *Lurgan Case* (2) the action was, as here, for a wrong committed by the defendants.

In the *Limerick Case* (5) it was held that an action under Lord Campbell's Act for compensation for the death of one of the inmates of a workhouse hospital whose death had been caused or accelerated by the negligence of the servants of the guardians, the defendants, was not maintainable. The reasons for the judgment are substantially those given in the subsequent case of *Dunbar v. Guardians of Ardee Union* (6), a decision of this Court. The decision there was that guardians were not answerable in damages in their corporate capacity for injuries caused by the negligence of their officials in the treatment of patients in the workhouse hospital. Fitz Gibbon, L.J., in delivering the judgment of the Court, says (at page 84):—"The question really at issue is, whether guardians of the poor are answerable in damages

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(1) 5 B. & S. 440.

(2) 1 R. 2 C. L. 202.

(3) L. R. 1 Q. B. 711.

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(4) L. R. 1 H. L. 93.

(5) 2 L. R. 1r. 42.

(6) [1897] 2 L. R. 76.

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in their corporate capacity for injuries caused by negligence of union officers in the treatment of poor patients received into workhouse hospitals. *Levingston v. The Guardians of the Lurgan Union* (1), decided by the Exchequer Chamber in 1868, shows that guardians are answerable to *third parties* for the wrongful acts of those acting under their orders or on their behalf." If that observation is applicable to the present case, it is plain that the County Council are liable. The learned Lord Justice then proceeds to deal with the real question considered in the case. "But we have to consider whether the same liability extends to injuries arising from the negligence of servants who have been properly employed by the guardians to discharge ministerial duties towards the recipients of relief under the poor law itself; in other words, towards persons accepting from the guardians, and under the poor law code, the eleemosynary provision made for them." After an elaborate discussion of this question he concludes—"For myself, it appears to me that, according to reason, and the common understanding of ordinary people, there is a clear distinction between the relations to customers, or to the public, of such companies as the Mersey Docks Board and the Trinity House, and those of poor law guardians to persons received for relief into a public hospital, which is really a charitable institution." Later on he says:—"I cannot hold that those personal acts or defaults of the subordinates are, in law, the acts of the guardians, nor are they acts which the guardians either could do themselves, or assumed the responsibility of doing through their servants."

The decision there was plainly based upon the incapacity of the plaintiff to maintain the action; and so, too, was the judgment in *Brennan's Case* (2).

The last two cases were, as already stated, approved of and followed in *Toxeland v. West Ham Union* (3), on grounds very similar to those in the judgment of Fitz Gibbon, L.J., to which I have referred. I especially mention a passage in the judgment of Buckley, L.J. After referring to *Levingston v. The Lurgan Guardians* (1), and *The Mersey Docks Trustees v. Gibbs* (4), the

(1) I. R. 2 C. L. 202.

(2) 2 L. R. Ir. 42.

(3) [1907] 1 K. B. 920.

(4) L. R. 1 H. L. 93.

learned Lord Justice proceeds:—"The question is, to my mind, entirely different when the plaintiff in the action is a person who is an object of the duties which the guardians have ministerially to perform. The proper administration of the poor law is, of course, a matter to be enforced. The question, however, is whether a pauper in an action brought against the guardians in their corporate capacity is a person capable of enforcing it. In my opinion he is not. The guardians no doubt owe the duty of providing the pauper with proper and sufficient food, with buildings of proper construction, with proper sanitary arrangements, and the like. But as matter of public policy it would be impossible that a pauper should be entitled to bring his action against the guardians for default so to do. *That is a matter to be controlled by the Local Government Board.*" This, I think, means that the duty due by the guardians is due not to the pauper but to the Local Government Board; and, accordingly, I hold that the true conclusion to be drawn from these three cases is that the duty of duly administering poor law relief in poorhouses and workhouse hospitals is a duty due by the guardians to the Local Government Board, who are now the ultimate and supreme authority, and not to the inmate patients themselves, and that the three cases mentioned by Kenny, J., viz. *Brennan v. The Guardians of the Limerick Union* (1); *Dunbar v. The Guardians of the Ardee Union* (2); and *Tozeland v. Guardians of West Ham* (3), do not govern nor, indeed, affect the present case. In it, the wrongful acts, the making of the void rate, and the direction to Drohan to levy it, are acts not of omission but of commission—acts not connected with the administration of poor law relief, but acts by which a member of the outside public was injured, as in *Levingston's Case* (4)—acts not of any of the subordinates of the council, but of the defendants, the council themselves, acting in their corporate capacity; and applying the principles of *The Mersey Docks Trustees v. Gibbs* (5), and *Levingston v. Guardians of Lurgan Union* (4), I am of opinion that if, as here, they resulted in injury to the plaintiff, the defendants, the council, are liable in respect of them to an action.

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(1) 2 L. R. Ir. 42.

(4) I. R. 2 C. L. 202.

(2) [1897] 2 I. R. 76.

(5) I. R. 1 H. L. 93.

(3) [1907] 1 K. B. 920.

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This brings me to the remaining question, Are the defendants liable for the act of Drohan in distraining?

I have already said that I am of opinion that the relation of master and servant did not exist between the council and Drohan, but here it is important to emphasize the distinction dwelt upon at some length by Mr. Justice Blackburn in *Mersey Docks Trustees v. Gibbs* (1) between the responsibility of a person who causes something to be done which is unlawful, and liability for negligence of those who do the work. In such a case as the present the liability does not depend on the relation of master and servant. "Liability for doing an improper act depends upon the order given to do that thing" is the language of Mr. Justice Blackburn.

The council directed Drohan to levy the rate by such of several means as he should think fit, of which distress is one. Drohan distrained. I hold that the council distrained—*qui facit per alium facit per se*. I have carefully considered this statutable code, and I cannot find in it one single provision that indicates an intention of the Legislature that urban councils who negligently violate their duty by making illegal rates, and direct the amount of them to be raised, should be irresponsible to a person whose home has been illegally entered in consequence of such negligence. To deprive such a person of such a common law right some affirmative statutable intention must be shown; and, finding none, I am of opinion that the council were joint trespassers with Drohan, and that a verdict should have been directed against them on the plea justifying under the distress.

As regards the other question, Mr. Conner insisted at the trial that there was no evidence of the warrant, and that therefore there was no evidence connecting the council with the seizure under this illegal rate, although they had filed a defence justifying under it; and undoubtedly this is so. The admission of Drohan cannot affect the council. I called attention during the argument to the 64th section of the Common Law Procedure Act, 1853, which provides that—"When any party shall rely on any deed or document, or any portion thereof, in his pleading, the said deed or document shall be produced upon every trial and argument

in the cause, unless its non-production can be satisfactorily excused." So far as I can see there was no excuse for the non-production of this document by the council; although it was in the hands of the rate collector, and not in those of the council, he was collecting the rate of the council, and I have no doubt they could easily have procured it. I think that they were bound to produce it at the trial, and if an application had been made for an adjournment of the case, and that had been refused and a verdict entered for the defendants, I should have been of opinion that the verdict should have been set aside. That, however, was not done; the case was left to the jury on the evidence as it stood, and all questions were reserved for the Court above, although there was no evidence of any act of the council sufficient to maintain the action, and although an objection based upon this had been urged by Mr. Conner at the conclusion of the plaintiff's case. Whatever we may think of the conduct of the county council, we must act according to legal principles. I am aware of some few cases—very few I think—in which this Court, upon the hearing of an appeal from the decision of a judge alone, without a jury, has allowed a document which was not given in evidence in the Court below to be given in evidence upon the appeal; and in the present case, without going that length, we, under the 64th section of the Common Law Procedure Act to which I have referred, required the warrant to be produced, and it was produced accordingly.

It is, however, one thing to require the production of a document in Court, and another to treat it as having been given in evidence at a previous trial before a jury. I entirely agree that we have no jurisdiction whatever to treat this document as having been given in evidence before the jury, and, therefore, unless for some reason we direct a new trial of the action, we must treat the case as one where, in fact, there is no evidence against the county council. For the reasons stated by Holmes, L.J., I agree that we ought not to direct a new trial. The amount involved is very small, and the plaintiff has obtained a verdict for the amount against one of the defendants, who is, *prima facie*, a solvent party. The case, as I have said, is a small one, which might have been tried in a Civil Bill Court, and there was undoubtedly, in my

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Appeal. opinion, default on the part of the plaintiff in not asking for an
 1914. adjournment of the case, so as to compel the production of the
 O'NEILL v. warrant.
 DROHAN AND I therefore entirely agree in the course suggested by the Lord
 WATERFORD Chancellor in reference to the costs.
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Solicitor for the appellant: *Robert S. Baylor.*

Solicitors for the respondent: *Dobbyn & M'Coy.*

R. ST. J. C.

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HAMILTON v. CLANCY (1).

May 8, 12. *Post Office—Telegram—Negligence by sub-postmaster in transmission—*
 19. *Liability for injury resulting from negligence—Duty of sub-postmaster*
as a public officer.

A sub-postmaster, in transmitting a telegram, acts as a public officer and in the discharge of a public duty, and if he is guilty of negligence in the transmission of the telegram, causing loss to the sender, he is liable to the sender for the loss so sustained.

Rouning v. Goodchild, 2 W. Bl. 906, applied and followed.

CASE STATED by Molony, J., under 27 & 28 Vict. c. 99, from the Connaught Spring Assizes, 1914.

The facts stated in the case are set out in the judgments, and may be summarized as follows:—The defendant was a sub-postmaster at Collooney, in the county of Sligo, and, as such, received from the post-office a fixed salary. On the 12th July, 1914, the plaintiff came to the post-office at Collooney, and handed to the defendant for transmission a telegram addressed to one John Long, of Grange, instructing Long to purchase for the plaintiff nine calves at £4 5s. each. The telegram was written on one of the ordinary official forms, upon the back of which the following condition was printed:—

“6. The Postmaster-General will not be liable for any loss or damage which may be incurred or sustained by reason or on

(1) Before MADDEN and MOLONY, JJ.

account of any mistake or default in the transmission or delivery of a telegram." K. B. Div.
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There was no telegraph line at Collooney, but there was a telephone line between Collooney and Grange which the defendant was authorized to use for the purpose of transmitting telegrams for the public, and the plaintiff's message was transmitted by this means. The message, as received by Long, directed the purchase by him for the plaintiff of nine calves at £5 5s. instead of £4 5s. Long acted upon the message as received by him. The plaintiff sued the defendant for the loss sustained by reason of the purchase by Long at the higher price, alleging that the error in the price was the result of negligence by the defendant in the transmission of the telegraphic message. The county court judge gave the plaintiff a decree for £6 15s. From this decree the plaintiff appealed. At the hearing of the appeal the facts, and the negligence of the defendant, were admitted, and it was submitted by defendant's counsel that upon those facts a question of law arose as to the liability of the defendant for his negligence, and that the case should be treated as a test case as to the liability of deputy-postmasters for negligence in the transmission of telegrams. Accordingly, the question of law was reserved for the court by the stating of the case upon the admitted facts, and the submission of the question whether upon those facts the plaintiff was entitled to an affirmance of the decree of the county court.

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Gerald M'Carthy (with him *Samuels, K.C.*, and *Powell, K.C.*),
for the defendant:—

In order to establish negligence there must be a duty moving from the person whose acts are complained of to the person injured. Here there is no contract other than a contract between the Postmaster-General and the plaintiff. The conditions endorsed upon the telegraph form, and Rule 36 of the Treasury Regulations of 10th September, 1898, made in pursuance of the Telegraph Act, 1885 (48 & 49 Vict. c. 58, s. 2), exempt the Postmaster-General from liability for loss arising out of negligence in the transmission of telegrams. The defendant, as the agent of the Postmaster-General, cannot be in a worse position than his principal. [He

K. B. Div. referred to *Playford v. United Kingdom Telegraph Company* (1);
 1914. *Dickson v. Reuter's Telegram Company* (2); *Bainbridge v. Post-*
 HAMILTON *master-General* (3); Telegraph Act, 1868, 31 & 32 Vict. c. 110;
 v.
 CLANCY. Telegraph Act, 1885, 48 & 49 Vict. c. 58.]

Leonard and Fetherstonhaugh, K.C., for the plaintiff :—

The cases cited for the defendant are all cases based on contract. Here the plaintiff's case does not rest on contract, but upon the duty of the defendant as a public officer. The Postmaster-General and his subordinate officials are alike public officers. A public officer owes a duty to the public to use reasonable care in the performance of the duties of his office, and any individual member of the public who has sustained damage by the neglect of such duties has an action against such public officer. That is the true view of the defendant's position in law, and that view is supported by abundance of authority. The text-books lay down the proposition that such a public officer is liable and can be sued for negligence by him which results in injury : Lord Halsbury, *Laws of England*, vol. xxiii, p. 316, par. 659; Addison on Torts (1906), pp. 18 and 19; Clark and Lindsell on Torts (1912), p. 33; Bowstead on Agency (1912), Article 133, p. 441; Evans, *Principal and Agent* (1888), pp. 393, 394; Story on Agency (1869), Article 319 (b), p. 396; and that proposition is confirmed and concluded by the authority of *Lane v. Cotton* (4); *Whitfield v. Lord Le Despencer* (5); *Rowning v. Goodchild* (6); *Barnes v. Foley* (7); *Schinotti v. Bumsted* (8); *Bainbridge v. Postmaster-General* (3); *Barry v. Arnaud* (9). The defendant is clearly a public officer as defined by Best, C.J., in *Henly v. Mayor of Lyme* (10); and is liable for negligence in the discharge of his duties : *Ferguson v. Kinnoull* (11).

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| (1) L. R. 4 Q. B. 706. | (6) 2 W. Bl. 906; 3 Wils. 443. |
| (2) L. R. 3 C. P. D. 1. | (7) 5 Burr. 2711. |
| (3) [1906] 1 K. B. 178. | (8) 6 T. R. 646. |
| (4) 1 Lord Raymond, 646; 1 Salk. | (9) 10 A. & E. 646. |
| 17. | (10) 5 Bing. 91, at p. 108. |
| (5) 2 Cowp. 754 (see Lord Mansfield's judgment at p. 765). | (11) 9 Cl. & Finn. 251, at p. 279. |

A. W. Samuels, K.C., in reply :—

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The defendant was deputy of the Postmaster-General (see Post Office Act, 1908, sect. 42), and could only receive telegrams for dispatch upon the terms of the post-office statutory regulations, which have the effect of an Act of Parliament. These regulations provide that the Postmaster-General shall be absolved from all liability for mistakes. There was a contract between the sender and the Postmaster-General to send the telegram on these conditions, and as the principal cannot be made liable for the mistake, so the deputy acting in dispatch of the telegram cannot, in the absence of wilful misfeasance, be made liable. This is an attempt to make the employee of the Crown warrant the correctness of a telegram which the contract with the Crown provides is not so warranted. As against the Postmaster-General himself, if he actually sent the telegram, the stipulation is that no action would lie, and the sender cannot acquire an additional right outside the contract because the deputy, and not the principal, acts. The condition as to repetition of the telegram if the sender requires to guard against errors in transmission shows that the sender is warned that mistakes may occur on the part of the employees, and negatives the idea that the employees, in absence of misfeasance, can be sued for mistakes. The contract was between the Crown and the sender, and the employee of the Crown cannot be sued for an injury arising out of the contract: *Winterbottom v. Wright* (1). No duty giving ground for an action exists between the sender and the post-office employee. There is no statutory duty imposed on the employee for breach of which he could be sued. The statutory duties imposed by the Telegraph Act, 1863, sect. 45, and Post Office Act, 1908, sects. 50 to 57, relate to wilful misfeasance, and criminal offences in transmission of telegrams. For breach of these duties a civil action would lie by a person injured; but there is no such misconduct alleged here. It is a mere innocent mistake. There is no statutory duty imposed not to make a mistake. The only duty imposed on the post-office servant is to perform faithfully his services as an employee of the Crown in accordance with the regulations of the post-office service

(1) 10 M. & W. 109.

K. B. Div. under the directions of the Postmaster-General. Further, there
 1914. is no such duty imposed by common law on the employee as would
 HAMILTON make him liable in an action for a mistake arising through
 v. negligence in forwarding the message. "The general rule of
 CLANCY. law is clear, that no action is maintainable for a mere statement,
 although untrue, and although acted upon to the damage of the
 person to whom it is made, unless that statement is false to the
 knowledge of the person making it": Bramwell, L.J., in
Dickson v. Reuter's Telegram Co. (1). Before the acquisition by
 the Crown of the telegraph service, an employee of the telegraph
 companies could not have been sued in an action such as the
 present. The contract would have been between the company
 and the sender, and no duty would have arisen as between the
 employee and the sender: *Earl v. Lubbock* (2); *Le Lievre v.*
Gould (3). The transfer of the telegraph system to the Crown
 by the Acts of 1868 and 1869 did not impose on the employees
 taken over under s. 8, sub-s. 7, of the Telegraph Act of 1868,
 any greater liability to the public than they previously bore. It
 would be strange if they were, as employees of the companies, free
 from liability for a mistake in 1867, and became in 1869 liable
 because they became servants of the Crown. The position of
 the companies is shown by *MacAndrew's Case* (4); *Playford's*
Case (5), and *Dickson's Case* (6). Their liability was wholly
 in contract, and only existed as between the sender and the
 company. The receiver of the telegram had no right of action
 against the company for mistake or negligence in dispatch or
 delivery of the message. If the company were liable in tort,
 as apart from contract, the recipient could have sued. The
 companies were mere messengers: they were not bound to warrant
 the correctness of the telegram; and no action lies at common law
 for a mere negligent misrepresentation—"no erroneous statement
 is actionable unless it is intentionally false": *Dickson v. Reuter's*
Telegram Co. (7), *per* Brett, M.R. The plaintiff's contention here
 is that the post-office civil servants became, through their taking

(1) 3 C. P. D. 1, at p. 5.

(5) L. R. 4 Q. B. 706.

(2) [1905] 1 K. B. 253.

(6) 2 C. P. D. 62, at p. 69;

(3) [1893] 1 Q. B. 401, at p. 497. 3 C. P. D. 1.

(4) 17 C. B. 3.

(7) 3 C. P. D. 1, at p. 7.

employment under the Crown, liable to be sued in tort for mistakes for which the telegraph companies themselves before the transfer to the Crown could not have been made liable.

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All the cases relied on for the plaintiff in which post-office officials were stated to be liable, were cases of wilful misfeasance, or breach of a statutory duty. In *Rowning v. Goodchild* (1) there was a refusal to deliver a letter except on payment of an illegal charge, in violation of 9 Anne, c. 10. The words of Lord Mansfield, C.J., in *Whitfield v. Le Despencer* (2), are too absolutely expressed where he states that "whoever does an act from which another person receives an injury is liable in an action for the injury sustained," since the idea of duty is absent. It is the idea of duty which is the determining test: see Bevan on Negligence, vol. i, 277 (1908 ed.); *Robinson v. Gell* (3); *Atkinson v. Newcastle Waterworks* (4). In *Lane v. Cotton* (5), the deputy, Breese, would only have been liable if he himself had taken out the exchange bills which were stolen; see the answer, p. 655: "He might be charged as a tortfeasor, but Breese cannot be charged as an officer, for neglect: for misfeasance of a deputy an action will lie against him, but that is not *qua* officer, but *qua* tortfeasor." The passage cited from Story on Agency (319b) is a mere general statement as to the liability of subordinate officials, founded on Lord Mansfield's statement in *Whitfield v. Le Despencer* (2), and can only apply where the personal negligence or omission of a deputy postmaster involves a breach of statutory duty, or amounts to misfeasance, giving ground to an action at common law. In *Henly v. The Mayor of Lyme* (6), there was a breach of duty for which an indictment would lie, and the words of Best, C.J. (5 Bing. at p. 108), that in the case of a public officer, "if by an act of negligence or any act of abuse in his office any individual sustains an injury, that individual is entitled to redress in a civil action. If that be so, then it is quite clear that the plaintiff in this case is entitled to redress in a civil action," must be taken to

(1) 3 Wilson, 443.

(2) 2 Cowp. 754, at p. 765.

(3) 12 C. B. 191.

(4) 2 Ex. D. 441.

(5) 1 Ld. Raymond, 646; 1 Salk. 17

(6) 5 Bing. 91.

K. B. Div. refer to an "abuse of office," that is, wilful misfeasance or act
 1914. — of negligence in discharge of a statutory or common law duty.
HAMILTON In the absence of a breach of legal duty imposed on him by
v. his office, a civil servant is not more liable to an action than
CLANCY. any other individual: *Henly v. Mayor of Lyme* as explained in
McKinnon v. Penson (1), by Pollock, C.B., "There is no doubt
 of the truth of the general rule, that where an indictment can
 be maintained against an individual or a corporation for
 something done to the general damage of the public, an action
 on the case can be maintained for special damage thereby
 done to an individual—upon this ground the corporation of
 Lyme Regis were held to be bound to compensate an individual
 for the loss sustained by non-repair of sea-walls." They were
 bound to repair *ratione tenuræ*. The proposition contended for
 by the plaintiff is far too wide. There was no statutory and
 no common law duty by virtue of the office of postmaster imposed
 on the defendant to guarantee the authenticity of the message.
 The fact that the mistake was made by the defendant in the
 course of his ordinary business gives no ground of action. "It is
 never laid down that the exemption from liability for an innocent
 misrepresentation is taken away by carelessness." "Inaccuracy
 in a telegram is more likely to mislead than inaccuracy in a
 verbal statement; and the delivery of a telegraphic message is a
 more formal matter than the communication of a message by
 word of mouth. I cannot, however, see any distinction in
 principle between them": *Dickson v. Reuter Telegram Co.* (2),
per Lord Bramwell.

The fact that no such action as this has ever previously been
 brought, though myriads of telegrams are sent, and occasional
 mistakes on the part of officials in sending them are inevitable,
 is a strong argument that the present action is misconceived.

Cur. adv. vult.

May 19.

MADDEN, J. :—

This case comes before us on a case stated by my brother
 Molony for the opinion of this Court. The plaintiff obtained
 from the county court judge of the County of Sligo a decree for

(1) 8 Ex. 319, at p. 327.

(2) 3 C. P. D. 1, at p. 6.

£6 15s. against the defendant, who is sub-postmaster of Collooney in that county. The facts, as stated in the case, are as follows:—The plaintiff handed to the defendant in his office a telegraphic message, in the ordinary form, on which a statement of the statutory immunity of the Postmaster-General was set out, for transmission to one John Long, at Grange, directing him to buy nine calves for the plaintiff, at £4 5s. each. There is a post-office telephone between Collooney and Grange, and the defendant was authorized by the Postmaster-General to use it for the purpose of transmitting messages sent by telegram. The telegram as received by Long stated the price as £5 5s., on which he acted, whereby the plaintiff suffered loss to the amount of £6 15s. The case finds that “the defendant was guilty of negligence in the transmission of the said telegram, and the plaintiff thereby suffered loss to the amount of £6 15s. The plaintiff obtained a decree for this amount; and the question submitted for the opinion of the Court is whether upon the facts stated the plaintiff is entitled to an affirmance of this decree.”

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The question of the liability of the Postmaster-General for the negligence of his servants or deputies was raised in the year 1699, not many years after the establishment of the office by 12 Car. 2, c. 35, in *Lane v. Cotton* (1), where it was held by the majority of the court, Holt, C.J., dissenting, that he was not liable. But the leading case on the subject is *Whitfield v. Lord Le Despencer* (2). This was an action of negligence brought against the Postmaster-General by the senders of a letter in which a bank-note for £100 was enclosed, entrusted to the care of the defendant for delivery. It was alleged that, by the negligence of the defendant, his servants and deputies, the bank-note was taken out of the letter by a sorter in the employment of the defendant. The case came before the Court of King's Bench upon a special verdict setting forth the facts of the case. The position of the Postmaster-General is clearly defined by Lord Mansfield. He rejects the opinion of Holt, C.J., who regarded the Postmaster-General as occupying the position of a common carrier, and adopts the decision of the

(1) 1 Lord Raymond, 646; 1 Salk. 17.

(2) 2 Cowp. 754.

K. B. Div. majority of the court in *Lane v. Cotton* (1) as deciding "that
 1914. an action on the case would not lie against the Postmaster-
 HAMILTON General for loss in the office by the negligence or fault of
 v. his servants." "The case of the postmaster, therefore, is
 CLANCY. in no circumstances whatever similar to that of a common
 Madden, J. carrier; but he is, like all other public officers, such as the
 Lords Commissioners of the Treasury, the Commissioners of
 the Customs and Excise, the Auditors of the Exchequer, etc.,
 who were never thought liable for any negligence or misconduct
 of their inferior officers in their several departments."

Although the sender of a letter or telegram which mis-
 carries through negligence has no remedy against the Postmaster-
 General, he has a right of action against the subordinate officer
 to whom negligence can be brought home. "As to an action on
 the case lying against the party really offending, there can be
 no doubt of it," says Lord Mansfield, adding, "for whoever does
 an act by which another person receives an injury, is liable in an
 action for the injury sustained." It has been pointed out that in
 stating the reasons on which his opinion is founded, Lord
 Mansfield seems to have laid down principles of too general
 application, inasmuch as he omits the element of duty. That
 this element existed in the class of cases to which his judgment
 refers is evident, and his general observations must be read in
 connection with the facts of the case with which he was dealing.

The principle laid down by Lord Mansfield as to the liability
 of the party actually guilty of negligence has been recognized
 and applied in subsequent cases. I need only refer to one, *Rowning*
v. Goodchild (2), where a deputy postmaster was held responsible
 in damages for negligence consisting in the non-delivery of
 letters directed to the plaintiffs, which it was the duty of the
 defendant to deliver.

The application of these decisions to the position of the Post-
 master-General in relation to the undertakings of the telegraph
 companies, which he was empowered by the Telegraph Act of
 1868 to work in connection with the administration of the post-
 office, was considered by the Court of Appeal in England in

(1) 1 Lord Raymond, 646; 1 Salk. 17.

(2) 2 W. Bl. 906.

Bainbridge v. Postmaster-General (1). The Telegraph Act of 1863, by which these companies were regulated, contained a provision that the company was to be responsible for the acts or defaults of the company or any person in their employment. It was contended that, inasmuch as this Act was incorporated with the Telegraph Act of 1868, the Postmaster-General, who takes over the work of the telegraph company, was placed in the position of the company as regards responsibility for the acts of his subordinates. Collins, M.R., states as his conclusion, from an examination of *Whitfield v. Lord Le Despencer* (2), that the Court "adopted the reasoning of the authority in the earlier case, and arrived at the conclusion that the subordinate officers are officers of the Crown, and not in the relation of servants to their superior officers." Passing to the question whether there is anything to be found in the Telegraph Acts which would cut down or alter the position of the Postmaster-General in relation to telegraphs from the position which he held in respect to his ordinary duties as Postmaster-General before he took over the telegraphs, he concluded, from an analysis of the sections which were supposed to impose this liability, that they leave the Postmaster-General where he was before these Acts were passed.

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This decision of the Court of Appeal is clearly an authoritative statement of the position of the Postmaster-General and his subordinate officers. It is conclusive both as to the immunity of the Postmaster-General, and as to the responsibility of a subordinate who fills the position of a public officer, for negligence in the transmission of telegraphic messages. The defendant in the present case satisfies the test laid down by Best, C.J., in *Henly v. Mayor of Lyme* (3). "What constitutes a public officer? In my opinion, everyone who is appointed to discharge a public duty and receives a compensation in whatever shape, whether from the Crown or otherwise, is constituted a public officer." The sub-postmaster is appointed to discharge the public duty of transmitting telegrams, and he receives compensation out of moneys voted by Parliament. The duty is cast upon him to use reasonable

(1) [1906] 1 K. B. 178.

(2) 2 Cowp. 754.

(3) 5 Bing. 91, at p. 107.

K. B. Div. care and diligence in the discharge of the public duty for which
 1914. he is paid. The case finds that, so far from discharging this
 HAMILTON obligation, the defendant has been guilty of negligence in the
 v. transmission of the telegram sent by the plaintiff. I am, therefore,
 CLANCY. of opinion that the plaintiff is entitled to an affirmance of the
 Madden, J. decree for the sum awarded to him by the county court judge.

MOLONY, J. :—

The civil bill in this case was brought to recover £9 for damages sustained by the plaintiff through the negligence of the defendant in the transmission and delivery of a certain telegram.

It appears from the facts as found by the case that the defendant is the sub-postmaster at Collooney, in the county of Sligo. He was duly appointed by the Postmaster-General, and is paid a fixed salary for the performance of his duties. On the 12th July, 1913, the plaintiff handed the defendant a telegram for transmission by telegraph to Mr. John Long, of Grange. The defendant was guilty of negligence in the transmission of the telegram, and the plaintiff thereby suffered loss to the extent of £6 15s. The county court judge gave him a decree for that amount, and the question for the opinion of the Court is whether, upon the facts stated, the plaintiff is entitled to an affirmance of the decree.

By sect. 41 of the Telegraph Act, 1863 (26 & 27 Vict. c. 112), every telegraph was declared to be open for the messages of all persons alike without favour or preference.

Under the provisions of the Telegraph Act, 1868, sect. 4, the Postmaster-General was empowered to purchase the undertakings of the then existing telegraph companies; and by sect. 8, subsect. 7, the officers and clerks who were taken over were to be deemed to be for all intents and purposes officers and clerks in the permanent civil service of the Crown.

The Telegraph Act of 1869, sect. 4, provided that the Postmaster-General should have the exclusive privilege of performing all the incidental services of receiving, collecting, or delivering telegrams, subject to certain exceptions named in the 5th section, which are immaterial in the present case.

The enactments relating to the post office were consolidated by the Post Office Act, 1908, and by sect. 42 of that Act it is provided that the Postmaster-General may appoint such officers, deputies, agents, and servants as may seem to him necessary; and sect. 92 provides that any officer appointed under any enactment thereby repealed should continue and be deemed to have been appointed under that Act.

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The effect of these provisions is, that the Postmaster-General has a monopoly of the telegraphic service, but that the service is available for all persons alike, and the plaintiff was entitled to require the defendant as sub-postmaster to transmit the telegram which he handed to him.

By the Telegraph Act of 1885 (48 & 49 Vict. c. 58, sect. 2) the Lords Commissioners of the Treasury were empowered to make regulations for the transmission of telegrams, and by Rule 36 of the Treasury Regulations of the 10th September, 1898, the Postmaster-General was declared not to be liable for any loss or damage which might be incurred or sustained by reason or on account of any mistake or default in the transmission or delivery of a telegram. This regulation is also one of the conditions endorsed upon the back of the telegram form, and it is clear that the Postmaster-General is himself expressly exempted from liability. This is admitted by the plaintiff's counsel, but they say that although the Postmaster-General is exempt, the defendant is liable in respect of his own personal negligence.

The plaintiff had no option but to send the telegram by the post-office service; and the defendant, as sub-postmaster, was bound to accept the telegram for transmission. The Postmaster-General must necessarily act through his deputies and servants, and is protected from liability; but the question is, Does this immunity attach to a deputy who is guilty of negligence in the discharge of the duty entrusted to him by the Postmaster-General? This duty is a public duty, because the telegraph service is open to all, and the defendant must, on the case, be taken to have been guilty of negligence in the discharge of a public duty which he was paid to discharge, and by reason of which negligence the plaintiff sustained pecuniary loss.

K. B. Div. In *Ferguson v. Kinnoull* (1) the general principle of law applicable to the present case is stated by Lord Lyndhurst as follows:—
 1914.
 HAMILTON “When a person has an important public duty to perform, he is
 v. bound to perform that duty; and if he neglects or refuses so to
 CIANCY. do, and an individual in consequence sustains injury, that lays
 Molony, J. the foundation for an action to recover damages by way of compensation for the injury that he has so sustained.”

In *Henly v. Mayor of Lyme* (2), Best, C.J., lays down the principle as follows (p. 108):—“If a man takes a reward, whatever be the nature of that reward, whether it be in money from the Crown, whether it be in land from the Crown, whether it be lands or money from any individual, for the discharge of a public duty, that instant he becomes a public officer; and if by any act of negligence, or any act of abuse in his office, any individual sustains an injury, that individual is entitled to redress in a civil action.”

The principle laid down by Lord Lyndhurst and Best, C.J., has been long applied to the liability of the Postmaster-General and his subordinates.

In *Lane v. Cotton* (3), which was an action against the Postmaster-General for losing exchequer bills, it appeared that the bills, enclosed in a letter, had been delivered to the post office in London into the hands of one Breeze, who was appointed by the post office to receive the letters, and had a salary. The letter was opened in the office by a person unknown, and the exchequer bills taken away. It was held by three judges (Holt, C.J., dissenting) that the Postmaster-General was not liable, but that Breeze was liable.

This case was considered by Lord Mansfield in the case of *Whitefield v. Lord Le Despencer* (4), which was an action brought against the Postmaster-General for a bank note which had been stolen by one of the sorters out of a letter delivered to the post office. Lord Mansfield considered that the action did not lie against the Postmaster-General, but added (p. 765)—“As to an action on the case lying against the party really offending, there

(1) 9 Cl. & F. 251, at p. 279.

(2) 5 Bing. 91.

(3) 1 Salk. 17.

(4) 2 Cowp. 754.

can be no doubt of it; for whoever does an act by which another person receives an injury, is liable in an action for the injury sustained. If the man who receives a penny to carry the letters to the post office loses any of them, he is answerable; so is the sorter in the business of his department. So is the postmaster for any fault of his own." K. B. Div.
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Molony, J.

This judgment is, of course, subject to the observation that the party offending must owe a duty to the plaintiff.

Lane v. Cotton (1) and *Whitfield v. Lord Le Despencer* (2) were both cases in which the action was brought against the Postmaster-General, but *Rowning v. Goodchild* (3) appears to be the first case in which an action was brought against a subordinate official of the post office. In that case the deputy postmaster at Ipswich failed to deliver letters which the Court held it to be his duty to deliver under a statute of Anne. It was objected that the action did not lie against the deputy postmaster, but should have been brought against the Postmaster-General. De Grey, C.J., in giving judgment said:—"We think that in all cases deputies are answerable for their own personal misfeasance, such as detaining the letters in question; and in the present case the deputies are made by Act of Parliament, *ex necessitate rei*, substantive officers, and their duty pointed out as such. And it is fitter for the subject to resort to them for satisfaction for injuries done by themselves than to their principals" (p. 910).

I think the law to be deduced from all these cases is correctly stated in "Story on Agency," 7th ed., p. 396:—"Although neither the Government nor its superior officers are responsible to third persons for misfeasances, or negligences, or omissions of duty of the subordinates in office properly or necessarily employed under them, it by no means follows that such subordinates are themselves exempted from all personal liability therefor to third persons. On the contrary, the very consideration that the public superiors are not responsible for acts and omissions of their subordinates in their official conduct, distinguishes the case from that of mere private agencies, and lets in the doctrine that, under such circumstances;

(1) 1 Salk. 17.

(3) 2 W. Bl. 906.

(2) 2 Cowp. 734.

K. B. Div. they shall be held personally responsible therefor to third persons
 1914. who are injured thereby. Thus, for example, deputy postmasters
HAMILTON are held responsible to third persons for any injuries or losses
v. sustained by the latter, from the personal negligence or omissions
CLANCY. of such deputy postmasters.”
Molony, J.

Mr. Samuels, for the defendant, admitted that it was the duty of his client to forward the telegram, but he contended that he was not liable for negligence in the discharge of that duty ; that the Postmaster-General was protected by statute, and that no greater liability could attach to a servant of the Postmaster-General, appointed, or deemed to have been appointed, under sect. 42 of the Post Office Consolidation Act, 1908, than to the Postmaster-General himself in forwarding messages. He also contended that there was no liability for mere negligence, and that in order to attach liability there must be wilful misconduct.

The distinction assumed by Mr. Samuels between negligence and wilful misconduct is not drawn in any reported case, and would, I think, be one fraught with very dangerous consequences to the public.

Mr. Samuels also contended that the postmasters owe a duty to the Postmaster-General, but to nobody else ; and that the only course open to a person who has suffered loss by the negligence of a postmaster is to apply to the Postmaster-General for his dismissal. I do not see that this is a legal remedy, and the effect of Mr. Samuels's argument is that a member of the public who sustains loss would be without any remedy whatever.

Several cases were referred to by Mr. Samuels and Mr. M'Carthy but after carefully considering them, I do not think that they in any way apply in the circumstances of the present case.

Playford v. The United Kingdom Telegraph Company (1) was a case which depended entirely upon contract, and it was held that the plaintiff, who was a stranger to the contract with the company, could not maintain an action against them for the breach of it. The present case, however, is not founded on contract.

Dickson v. Reuter's Telegraph Company, Limited (2) was a case in which the defendants, through the negligence of their servants,

(1) L. R. 4 Q. B. 706.

(2) 3 C. P. D. 1.

delivered to the plaintiffs a message which was not intended for them, and the plaintiffs, having acted upon the telegram, sustained a loss. Lord Bramwell, in giving judgment, says:—"Before any person can complain of negligence, he must make out a duty to take care, and that duty can only arise in one of two ways, namely, either by contract or by the law imposing it" (pp. 5 and 6). In that particular case there was no contract, and there was no duty.

In the present case there is no contract, but there is a duty imposed upon the defendant by the law, which he has failed to discharge.

Robinson v. Gell (1) is also distinguishable. In that case it was held—and properly held—that no action lay against the clerk of the court for omitting to prepare a notice; but it appeared that there was no statute which imposed the duty upon the clerk.

McAndrew v. The Electric Telegraph Company (2) does not assist the defendant, because what it decides is that a company may, by express contract, exempt themselves from liability for mistakes in the transmission of telegrams.

The case of *Bainbridge v. The Postmaster-General* (3) was also referred to. It shows that the Postmaster-General is not liable (as was admitted in this case), in his official capacity as head of the telegraph department of the post office, for wrongful acts done by his subordinates in carrying on the business of the department; but it does not affect the liability of the subordinates for their own wrongful acts.

On the whole case, after having carefully considered all the authorities referred to by Mr. Samuels, I am clearly of opinion that the plaintiff is entitled to succeed, and is therefore entitled to an affirmance of the decree.

Solicitor for the plaintiff: *M. Howley*.

Solicitor for the defendant: *E. R. Bate*.

C. N. K.

(1) 12 C. B. 191.

(2) 17 C. B. 3.

(3) [1906] 1 K. B. 178.

Appeal.
1914.

Jan. 13.

HUTCHINSON, APPELLANT; NEW NORTHERN SPINNING
AND WEAVING COMPANY, LTD., RESPONDENTS (1).

Employer and workman—Appeal—Security for costs—Workmen's Compensation Act, 1906—Order LVIII, Rule 15.

Upon an appeal from an order of the Recorder of Belfast, under the Workmen's Compensation Act, 1906, refusing a workman's request to review "without liberty to apply," the respondent-employers applied for an order directing the appellant to lodge security for costs of appeal.

Held, that having regard to the policy of the Workmen's Compensation Act, 1906, it is not the practice in Ireland to require a workman to lodge security for the costs of his appeal to the Court of Appeal.

Stormount v. Workman, Clarke, & Co., Limited (note, *post*, p. 532), followed.

MOTION on behalf of the employers, who were the respondents, for an order that the appellant workman do lodge in Court security for the respondents' costs of the appeal, and in default thereof that the said appeal be dismissed.

The workman, who was a minor, sustained injuries through an accident which occurred to him on the 13th November, 1912, while in the employment of the respondents. Compensation was paid to him until 17th February, 1913, when he returned to work. He continued at his work until the 17th March, 1913, and then left. Negotiations afterwards took place between his solicitor and the respondents with the object of obtaining light work for the applicant; but, no arrangement being arrived at, the applicant's request for arbitration was issued on the 14th April, 1913, and came before the Recorder of Belfast, on the 13th May, 1913, when the Recorder made an order refusing the request, "with liberty to apply." Two days afterwards, on the 19th May, 1913, the applicant again returned to work with the respondents; and on 7th July, 1913, he was dismissed from their employment. The applicant thereupon issued a request to review, which was

(1) Before O'BRIEN, L.C., HOLMES and CHERRY, L.JJ.

heard by the Recorder of Belfast, on 19th November, 1913. The Recorder refused the request, and also refused liberty to apply. From this order the applicant appealed. The solicitor for the respondent company then wrote requesting that the applicant should give security for costs, and the solicitor of the latter refused to give such security, on the ground of the poverty of the applicant and of his next friend.

Appeal.
1914.
HUTCHINSON
v.
NEW
NORTHERN
SPINNING
AND
WEAVING
Co., LTD.

J. H. Robb (with him *Hanna, K.C.*), for the employers:—

There are special circumstances in this case which entitle the employers to an order for security for the costs of the appeal. The Recorder of Belfast has twice refused the applicant's request, and he was so convinced of his ability to work that he refused liberty to apply again when the last application was heard. We do not base our application on the mere ground of poverty of the applicant. That of itself would not in Ireland constitute such special circumstances as would enable security for costs to be ordered: *Brooke v. Kavanagh* (1). It is the common practice in England to order security for costs on appeal. [He referred to Order LVIII, Rule 15.]

[Holmes, L.J., referred to *Stormount v. Workman, Clarke, & Co., Limited* (2).] That case is distinguishable. There were no exceptional circumstances in that case such as there are here. The case does not lay down an absolute rule.

T. J. Campbell, for the workman (appellant):—

Stormount v. Workman, Clarke, & Co., Limited (2), is a decision of this Court, and it shows that it is contrary to the policy of the Workmen's Compensation Act to require the workman to give security for costs of appeal. In this case the poverty of the workman is due to the accident for which he claims compensation: *Skeggs v. Keen* (3). An order such as the employers ask for here has never been made in this country. It would seriously affect the workmen to set up any such precedent, for in most cases it would be impossible for them to provide security.

(1) 21 L. R. Ir. 474.

33 I. L. T. and S. J., p. 165.

(2) See note, *post*, p. 532, and (3) 1 Minton-Lenhouse, 119.

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Co., LTD.

The rule is laid down in *Stormount v. Workman, Clarke, & Co., Limited* (1), in terms which we could not hope to better.

Motion refused with costs.

Solicitor for the applicant : *Nathaniel Tughan*.

Solicitor for the respondents : *John M. Hamill*.

J. M.

NOTE.

COURT OF APPEAL, April 17, 1899.

Before LORD ASHBOURNE, C., and FITZGIBBON, HOLMES, and WALKER, L.JJ.

STORMOUNT v. WORKMAN, CLARKE, & CO., LIMITED (2).

Hume, for Workman, Clarke, & Co., moves motion for security for costs of appeal.

The son of the applicant sustained injury, causing death, in the shipbuilding yard of the respondents. The applicant brought proceedings under the Workmen's Compensation Act, claiming to have been partially dependent on his son's earnings. The Recorder of Belfast found as a fact that no person was dependent on deceased, and dismissed the claim.

Security for costs of the appeal from the decision of the Recorder of Belfast was asked for on the grounds :—(1) poverty of appellant ; (2) that it is a speculative appeal, no question of law raised ; (3) that the appeal is really one by a third party, a trades union : (4) that there is not a *prima facie* case for an appeal. He cited : *Hall v. Snowden, Hubbard, & Co.* (3), security for costs ordered under Workmen's Compensation Act : *Brooke v. Kavanagh* (4) ; *McDonnell v. Alcorn* (5) ; *In re Ivory* (6).

Chambers, for the respondents.

Whitaker, in reply.

(1) See note at end of case, and 33 I. L. T. and S. J., p. 165.

(2) The report is taken from a note in the Registrar's book.

(3) [1899] 1 Q. B. 593.

(4) 21 L. R. 1r. 474.

(5) 28 I. L. T. R. 64.

(6) 10 Ch. D. 372.

LORD ASHBOURNE, C. :—

The cases in which security for costs of appeal have been ordered to be given in this Court are very few, and security for costs was ordered only under very special circumstances. It would be contrary to the policy of the Workmen's Compensation Act to order security, where in almost every case the applicant is very poor, and necessarily unable to give security. If the appeal is one which should not have been brought, it should have been met by a motion to dismiss the appeal, and not by a motion for security for costs. Let the motion keep its place in the list, and the appeal and the motion will be dealt with together.

On the following day, the appeal was heard and dismissed with costs, and the motion for security for costs was refused without costs.

Appeal.

1914.

HUTCHINSON
v.
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AND
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Co., LTD.

MAGILL v. MAGILL (1).

Appeal.

1914.

Practice—Common Law action—Right to trial by jury—Jurisdiction to order trial by judge without jury.

Feb. 17.

Upon a motion in the King's Bench Division for final judgment upon a specially endorsed writ, the Court made no rule on the motion, and, notwithstanding the objection of the plaintiff, ordered that the action be tried by a judge without a jury, and without the delivery of further pleadings.

Held, by the Court of Appeal, that there was no jurisdiction to order the action to be tried without a jury when the plaintiff refused to consent to such an order.

APPEAL from an order of the King's Bench Division, refusing the plaintiff's motion for final judgment, and ordering that the action be tried before a judge without a jury, and without the delivery of any further pleadings.

The plaintiff sued the defendant on a specially endorsed writ, his claim being for £40 17s. 6d., whereof £38 12s. 6d. was for money paid by the plaintiff for and on account of the defendant at his request, and for principal and interest paid by the plaintiff to the Bank of Ireland, on foot of a promissory note for £35, dated May 19, 1913, and payable to the Governor and Company of the Bank of Ireland, at their offices, Dundalk, on September 22, 1913, made by the defendant as principal and by the plaintiff as surety for said defendant, which was duly presented for payment and dishonoured by the defendant, and whereof the sum of £2 5s. was for goods sold and delivered by the plaintiff to the defendant. On

(1) Before O'CONNOR, M.R., and HOLMES and CHERRY, L.JJ.

Appeal.
1914.
MAGILL
v.
MAGILL

January 26, 1914, the plaintiff applied to the King's Bench Division for final judgment for the sum endorsed on the writ. The defendant opposed the motion for final judgment, filing an affidavit alleging facts which in the opinion of the Court raised questions which ought to be tried, both in respect of the goods sold and the amount of the promissory note. The Court made no rule on the plaintiff's motion, and directed that "the action be tried before a judge without a jury, and without delivery of any further pleadings, the costs of the motion on both sides to be costs in the action." Counsel on behalf of the plaintiff objected to that part of the order which directed the action to be tried without a jury and without further pleadings. The present appeal was by the defendant from so much of the order of the King's Bench Division as directed the action to be tried without a jury and without the delivery of any further pleadings.

Denis Henry, K.C. (with him, *M'Loone, K.C.*), for the appellant :—

There is no jurisdiction to order the action to be tried without a jury when one of the parties objects. This order was made notwithstanding that counsel for the plaintiff protested. The rights of the parties in a common law action, as they existed prior to the Judicature Act, 1877, are preserved by section 48 of that Act. Rule 6 of Order 14, which provides that the Court may give leave to defend on terms as to security or time, or mode of trial as they may think fit, is limited to cases which under the rules may be tried without a jury : *M'Alinden v. Smith* (1).

D. M. Wilson, K.C. (with him, *Naish*), for the respondent, referred to Order XIV, Rule 8.

The Court allowed the appeal, the defendant undertaking to plead within two days, and to take short notice of trial. They directed the order of the Court below to stand as respects the costs of the motion there, and measured the plaintiff's costs of the appeal at £5 5s.

Solicitor for the appellant : *Robert Dickie.*

Solicitors for the respondent : *Sheridan & Co.*

(1) Unreported. Court of Appeal, Feb., 1909.

GRAMOPHONE COMPANY, LIMITED *v.* KING.
ST. GEORGE AND ANOTHER *v.* DELURY AND ANOTHER.
LUBE *v.* O'SHEA (1).

K. B. Div.

1914.

Nov. 3, 5.

Practice—"Moratorium"—*Postponement of Payments Act, 1914* (4 & 5 Geo. 5, c. 11)—*Proclamations postponing payment*—*Cause of action*—*Writ issued during suspensory period*—*Default of appearance*—*Dismissing action*—*Removing writ from file*—*Vacating judgment*.

The effect of the proclamations made under the *Postponement of Payments Act, 1914*, was to give a statutory credit for the period mentioned therein, so that during such period no action was maintainable in respect of a debt coming within the proclamations. If during the suspensory period a writ has been issued, the plaintiff is not entitled to judgment, although no appearance has been entered; and the Court, on the facts being brought to its notice, will of its own motion either dismiss the action or remove the writ from the files of the Court. If judgment has been inadvertently allowed to be marked, such judgment will be set aside by the Court when brought to its notice, without requiring the defendant to institute a motion for the purpose (2).

GRAMOPHONE COMPANY, LIMITED *v.* KING.

EX PARTE application for an order directing the officer to enter judgment for the plaintiff in default of appearance.

The indorsement on the writ of summons was as follows:—

STATEMENT OF CLAIM.

The plaintiff's claim is for £13 10s. 8d., the price of goods sold and delivered by the plaintiff to the defendant.

1914.

PARTICULARS.

Jan. 16,	to Goods	£5 19 4
April 9,		7 17 4
		£13 16 8

(Signed)

GEO. M. PORTER,

Plaintiff's solicitor.

(1) Before GIBSON, KENNY, and DODD, JJ.

(2) For the material portions of the statute and proclamations, and the directions issued to the officers of the King's Bench Division, see note, *post*, p. 541.

K. B. Div. The writ was issued on the 12th August, 1914, and served on
 1914. the 13th August, 1914.

GRAMOPHONE
Co., LTD. No appearance had been entered by the defendant.

v.
KING. *John Bartley*, for the plaintiffs :—

ST. GEORGE
v.
DELURY. In this case the writ was issued after the moratorium procla-
 LUBE mations in respect of a debt contracted before the date of the
v. proclamations, and there was no appearance. The officer refused
O'SHEA. judgment on the ground that the English Court of Appeal had
 decided that the effect of the moratorium proclamations was to
 take away the causes of action: *Auster, Ltd. v. Unden Motor*
Coach Works (1). Prior to the date of this decision, the practice
 in the office was to mark judgment in such cases, and leave the
 plaintiff to apply for leave to issue execution. My present
 application is for an order directing the officer to mark
 judgment.

The moratorium proclamations were introduced to postpone payments—not to suspend the cause of action. Debtors were to be allowed the period of grace mentioned in the proclamations, but they were not to get a further period of ten days by entering an appearance. This is clearly the construction put on the proclamations by the Lord Chief Justice of England when he issued his directions regulating the practice under the moratorium proclamations; and these directions, so far as the point now under consideration is concerned, were adopted by the Lord Chief Justice of Ireland. The first direction is “writs of summons are to be issued as heretofore.” This shows that the right of action was not postponed. The second direction puts the matter beyond all doubt—“after the issue of the writ no judgment is to be signed in default of appearance if it appears from the writ that the claim thereon comes within the proclamations or either of them.” This shows clearly that writs were to be issued in moratorium cases. The proclamations are valid only in so far as they are consistent with the Postponement of Payments Act; and this Act relates only to the postponement of payments, and does not in any way refer to the suspension of a right of action. Clear

(1) 31 T. L. R. 26.

words would be necessary to deprive a person of his right of action. In *Auster's Case* (1) the Court of Appeal expressly stated that the moratorium was a matter of defence.

K. B. Div.
1914.
GRAMOPHONE
Co., LTD.
v.
KING.

ST. GEORGE and ANOTHER v. DELURY and ANOTHER.

ST. GEORGE
v.
DELURY.

This was a summons for liberty to issue execution against the defendants on foot of a judgment for £91 14s. 4d., obtained in respect of a debt of £85, with £6 14s. 4d. costs.

LUBE
v.
O'SHEA.

The endorsement on the writ of summons was as follows:—
“Plaintiff's claim is for £85, being one year's rent due by the defendants to the plaintiffs on the 1st day of August, 1914, in respect of rights of stocking, dredging for, and carrying away oysters out of certain oyster beds, such rights being created by indenture, dated 12th September, 1913, made between the plaintiffs of the one part and the defendants of the other part.

The writ was issued on the 5th day of September, 1914, and served on the 8th September, 1914. Judgment was entered on the 15th October, 1914.

Louis Kelly, for the plaintiffs.

There was no appearance for the defendants.

LUBE v. O'SHEA.

This was a summons taken out on behalf of Henry Lube, of St. Mary's, Haddington Road, Dublin, for liberty notwithstanding the provisions of sect. 1, sub-sect. 1 (a), of the Courts (Emergency Powers) Act, 1914, to issue execution on foot of a judgment marked on the 17th October, 1914. The indorsement on the writ of summons was as follows:—

The plaintiff's claim is to recover possession of the stable situate in Thomas Lane at the rear of 80 Marlborough Street, in the parish of St. Thomas and city of Dublin, held by the defendant as a yearly tenant from the plaintiff under agreement in writing dated the 6th day of April, 1908, for non-payment of

K. B. Div. the rent hereof. And the amount of rent now due is as 1914. follows:—

GRAMOPHONE
Co., LTD. “ 1914.

v.

KING.

“ July 21st.

“ One year’s rent at the rate of £18 *per*

ST. GEORGE

v.

annum due to this date, ... £18 0 0 ”

DELURY.

LUBE

v.

O’SHEA.

The writ was issued on the 6th day of August, 1914. No appearance having been entered, judgment for the recovery of the premises was marked on the 17th October, 1914.

Gerald Horan, for the plaintiff.

There was no appearance for the defendant.

Nov. 5.

GIBSON, J. :—

In these cases the debts sued for are within the terms of the statutory proclamations of August 6th and September 3rd, 1914, made under the Postponement of Payments Act, 1914, and the writs were issued during the period of postponement. On the argument addressed to the Court the following points are presented for decision:—(1) Can an action be maintained for a debt of which the payment is so suspended? (2) If the action is premature, is that a matter which must be raised by defence? (3) If a judgment has been marked in such action, what is the position of such judgment? (4) If the action is premature, what should be done with the writ?

1. It appears clear that the debt, payment of which is deferred, remains a debt; but it is not payable *in præsentia*. There is a statutory credit given, which is at least as effectual as a contractual credit. An action on a bill which on the face of the writ had not matured, would be plainly unsustainable; and the writs before us being for debts not then payable, are clearly within the same principle. The terms of the proclamation as to interest, and as to paying before the expiration of the statutory credit, support this conclusion. The decision of Scrutton, J., in *Durell v. Gread* (1), and of the Court of Appeal in *Auster’s Case* (1), are direct

(1) 31 T. L. R. 22.

(2) 31 T. L. R. 26.

authorities on this point, which does not, indeed, require any authority. The view that the moratorium legislation only enlarges the period of defence, and does not affect the right of action, is manifestly not what is contemplated. It was never intended that writs should be issued before debts were exigible, or costs imposed on litigants entitled to the benefit of the statute, subject to the condition, for the benefit of creditors, that interest might be deferred in certain circumstances. Such a construction would cause unnecessary litigation at wasteful expense.

2. If the action is brought during the period of statutory credit, though this would be a good ground of defence, the defendant is not restricted to that form of relief. Where it is certain on the face of the writ and the admitted facts that there was and could be no present cause of action, the Court, under our rules, has manifest jurisdiction to set aside the writ oppressively brought. If the case went to trial without any defence raising the point, I think the Court should equally decline to treat the non-existing cause of action as entitling the plaintiff to judgment. Where the action is founded on something clearly and indisputably illegal, the Court, without any appropriate plea, dismisses the action: *North Western Salt Co. v. Electrolytic Alkali Co.* (1). I think the same principle applies to such legislation as is now before us, intended for the protection of the community, many of whom may be incompetent to get legal assistance. Lord Mansfield in *Holman v. Johnson* (2) describes "transgression of a positive law of this country" as justifying Court action: see also *Cranfield v. Manchester Ship Canal* (3). In such case an amendment of pleading, if necessary, would be allowed as a matter of course.

3. A judgment allowed to be marked inadvertently on a writ showing no cause of action cannot be allowed to stand. I think the Court, where such judgment is brought to its notice by the party who improperly obtained it, should set it aside without requiring the defendant to institute any motion, which his means or ignorance might make it impossible for him to do. The officer ought to bring such judgment to the notice of the Court at once, should any attempt be made to enforce it.

(1) [1913] 3 K. B. 422, judgment of Farwell, L.J.; [1914] A. C. 461.

(2) Cowper, 341.

(3) [1904] 2 Ch. 124.

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4. With regard to the writ, under similar circumstances, where the plaintiff himself brings the question before the Court, without motion on the part of the defendant, the Court might adopt either of two courses—dismiss the action or set aside the writ. The former course represents apparently the English practice, and there is no objection to following it. But, in my opinion, it is certain that if the defendant applied to set aside the writ as showing no present cause of action, the motion must be granted; and where the plaintiff himself brings the writ before the Court, I do not see why, on the plain policy of the legislation, the Court should not of its own motion remove from the files of the Court a writ placed there improperly and oppressively. A writ conveys to ignorant folk, unacquainted with law, and the intricacies of the proclamations, an impression of judicial sanction.

In *Auster's Case* (1) the Court declined to adopt this course, but there the majority of the items were uncovered by the moratorium protection. Where a writ comprises demands of various kinds, some written, some outside the statutory proclamations, it appears to me that as to the former, where the writ shows the true facts, judgment should not be given, whether the defendant appears and contests the case or not. The Court ought not to give what would be a manifestly wrong judgment. It is not a mere matter of error depending on technical rules of procedure. It is gross violation of a statute designed to meet an urgent national crisis.

With regard to the advisory directions issued by the heads of the Court in the long vacation, some instruction to the officers was desirable. The issue of all writs could not be safely prohibited—questions in each case might arise requiring discussion; and whatever be the effect of these rules, they cannot, of course, affect the construction of the Act. The English cases which I have referred to are quite inconsistent with the view of the rules now suggested by counsel. I would add that *Auster's Case* (1) was based on the items representing separate causes of action, and that it may not govern a case where the action is brought to recover a balance of account composed of small items on which general

payments on account have been made, resulting in a reduced general balance being struck. *K. B. Div. 1914.*

My brother Kenny agrees in the general result; but he has not read my judgment, and is not to be bound by all my reasoning. *GRAMOPHONE CO., LTD. v. KING.*

Dodd, J. :—

I concur in the judgment delivered by my brother Gibson, and in the reasons given. *ST. GEORGE v. LUBE v. O'SHEA.*

In the case of the Gramophone Company v. King the Court made the following order :—

“ It appearing to the Court that the alleged debt claimed by the writ was not, by reason of the Postponement of Payments Act, 1914, and the proclamations thereunder, payable at the time the writ was issued, and that the action is premature; the Court doth order that the action be dismissed, without prejudice to the plaintiff's right to proceed for the recovery of the said debt when the same has become payable.

In each of the other cases the Court made no rule on the summons, and ordered that the action should be dismissed, and the judgment vacated and discharged, without prejudice to the plaintiff's right to proceed for the recovery of the debt when the same had become payable.

Solicitor for the Gramophone Company : *George M. Porter.*

Solicitors for Katherine St. George : *Browne & Maunsell.*

Solicitors for Henry Lube : *Horan & Devine.*

A. E. C.

NOTE.

Postponement of Payments Act, 1914 (4 & 5 Geo. 5, c. 11), s. 1, sub-s. 1 :
 “ His Majesty may by Proclamation authorize the postponement of the payment of any bill of exchange, or of any negotiable instrument, or any other payment in pursuance of any contract, to such extent, for such time, and subject to such conditions or other provisions as may be specified in the

K. B. Div. Proclamation." Sub-s. 3: "Any such Proclamation may be varied, extended
1914. or revoked by any subsequent proclamation, and separate proclamations may
GRAMOPHONE be made dealing with separate subjects."

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A Royal Proclamation dated the 6th August, 1914, directed that, "save as hereinafter provided, all payments which have become due and payable before the date of this Proclamation or which will become due and payable on any day before the beginning of the 4th day of September, 1914, in respect of . . . any contract made before that time, shall be deemed to be due and payable on a day one calendar month after the day on which the payment originally became due and payable, or on the 4th day of September, 1914, whichever is the later date, instead of the day on which the payment originally became due; but payments so postponed shall, if not otherwise carrying interest, and if specific demand is made for payment, and payment is refused, carry interest until payment as from the 4th day of August, 1914, if they become due before that day, and as from the date on which they become due and payable if they become due and payable on or after that day, at the Bank of England rate current on the 7th day of August, 1914; but nothing in this Proclamation shall prevent payments being made before the expiration of the month for which they are so postponed."

The Proclamation contains certain exceptions, not material for the purposes of the above report. A subsequent proclamation, dated the 3rd September, 1914, directed that the proclamation of the 6th August, 1914, should "apply to payments which become due and payable on or after the 4th day of September and before the 4th day of October, 1914 (whether they become so due and payable by virtue of the said Proclamations or otherwise), in like manner as it applies to payments which became due and payable after the date of the said . . . Proclamation and before the beginning of the 4th day of September, 1914."

The following directions to the officers of the King's Bench Division, with respect to the practice of the Court in all cases affected by the Royal Proclamations dated the 2nd and 6th days of August, 1914, were issued by the Lord Chief Justice of Ireland:—

"1. Writs of summons are to be issued as heretofore.

"2. After the issue of the writ no judgment is to be signed in default of appearance if it appears upon the writ that the claim thereon comes within the proclamations or either of them. If in any such action judgment has already been signed, no execution shall issue in respect thereof except by leave of the Court."

VOLKL v. THE GOVERNOR AND GUARDIANS OF THE K. B. Div.
 HOSPITAL FOR THE RELIEF OF POOR LYING-IN-WOMEN 1914.
 IN DUBLIN, COMMONLY CALLED THE ROTUNDA Nov. 3, 5.
 HOSPITAL (1).

Alien—Right of alien enemy to maintain action—Aliens Restriction Act, 1914
 (4 & 5 Geo. 5, c. 12)—*Aliens Restriction (Consolidation) Order, 1914.*

An alien enemy duly registered under the provisions of the Aliens' Restriction Act, 1914, and Order made thereunder, and residing in a prohibited area of the United Kingdom under a permit, may sue in the Courts in this country, notwithstanding the existence of a state of war between this country and the country of the alien.

Princess Thurn and Taxis v. Moffitt, 31 T. L. R. 24, followed.

MOTION to stay the action on the ground that the plaintiff was an alien enemy. The action was brought to recover damages for injuries alleged to have been sustained by the plaintiff when she was a patient in the defendants' hospital, through the negligence of the defendants, their servants, and agents. The plaintiff was the wife of one Anthony Volkl, a subject of the Austro-Hungarian empire, who had been living in the United Kingdom for the past nine years, and was, until shortly after the declaration of war between His Majesty's Government and Austria-Hungary, employed as a waiter in a hotel in Dublin. Anthony Volkl had since left that employment, but was at the time of the present application registered under the Aliens Restriction Act, 1914, in the office of the Commissioner of Police in Dublin, as an Austrian subject. The plaintiff was herself born at Havant, Hampshire, on or about the 8th January, 1887, both her parents being English, and had lived continually in England until her marriage, which took place on or about the 12th March, 1912. From that date until the month of June, 1914, she had lived in Ireland with her husband. In June, 1914, she had returned to the home of her parents in Havant, Hampshire, and

Before GIBSON and DODD, JJ.

K. B. Div. had since that time been residing there. On the outbreak of the war, and the publication of the proclamation restricting the rights of aliens, she had become duly registered as an alien, and had from time to time reported herself as required by law. The plaintiff had got a permit authorizing her to reside at Havant, which was a prohibited area.

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Powell, K.C. (with him *A. V. Matheson*), for the defendants:—

The plaintiff is an alien enemy, and as such is debarred from suing during the continuance of the war. The fact that she is residing in the United Kingdom is not sufficient to enable her to sue. She must have some express permission from the Crown—tacit permission to reside is not enough. The enactments of the Napoleonic era dealt separately with registration of aliens, and licences to alien enemies to trade; it was the latter only which gave the right to sue. The Aliens Restriction Act, 1914, gives at most an implied permission to reside, but does not confer any rights, or give any licence.

[He also referred to Wheaton's International Law (1889 ed.), p. 424; Halleck's International Law (1878 ed.), Vol. II, p. 364; "*The Hoop*" (1); *Alcinous v. Nigreu* (2).]

O'Byrne, for the plaintiff:—

At common law the plaintiff would be a British subject, because born within His Majesty's Dominions. By the Act of 1870 she is made a subject of the State of which her husband is a subject. The British Nationality and Status of Aliens Act, 1914, is different in its terms, but does not come into operation until 1915. For the purpose of this case it must be assumed that the plaintiff is an alien enemy.

An alien enemy may sue if he is within the King's protection. He is within the King's protection if lawfully residing here. This was the rule at common law: Comyn's Digest, subtitle, Abatement, pp. 39-40, and cases referred to there. A written licence was not necessary to entitle an alien enemy to sue: residence in this country with the tacit permission of the authorities was sufficient: *Daubigny v. Davallon* (3). The right to

(1) Rob. A., 196. (2) 4 E. & B. 217. (3) 2 Anstr. 462, at p. 467.

sue is an incident of the King's protection, and "alien enemy" is not a good plea where the plaintiff is under such protection.

[Gibson, J.: You must argue that Parliament intended to do the same thing by registration under the Aliens Restriction Act of 1914, as was done by licence under the Act of 43 Geo. 3, c. 155. The Act of 1914 omits the provisions as to licences contained in that Act.]

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It is a matter of common knowledge that the Aliens Restriction Act, and several other Acts of the present year, were passed through Parliament in the course of a single day, to meet a pressing national crisis. This probably explains why it omits the complicated provisions as to licences contained in previous Acts. The Aliens Restriction Act, 1914, provides that His Majesty may, by order in council, impose restrictions on aliens. An order in council under the Act was made on the 9th September, 1914. That order provides that aliens must register, and they cannot move outside a five-mile radius without permission. Clause 18 (1) further provides that alien enemies shall not reside in certain prohibited areas without a permit. Plaintiff at present resides at Havant, which is a prohibited area. She has an express permit to reside there, and is duly registered. She is not only allowed but compelled to reside there. Is she not to be entitled to the King's protection? If she is allowed to remain, she must be allowed to remain unmolested. If the principle submitted by defendants is pushed to its logical conclusion, there is no reason why the criminal law should not also be held to be inapplicable. Plaintiff being duly registered is lawfully residing here, and entitled to sue: *Princess Thurn and Taxis v. Moffitt* (1).

A. V. Matheson, in reply:—

The Aliens Restriction Act, 1914, is a restrictive and not an enabling Act. It confers no rights, but simply imposes restrictions.

Cur. adv. vult.

(1) 31 T. L. R. 24.

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This action was brought by Mrs. Volkl for alleged negligence on the part of the defendants when she was in their hospital. The action was ripe for trial when the war broke out. She was an English subject residing at Havant, when she married her husband, an Austrian, in 1912. He is now an alien enemy. It is not disputed that he and she have been duly registered, and that she has got a permit authorizing her residence at Havant, a prohibited area. That an enemy alien cannot bring or maintain an action unless he is residing in the realm by lawful permission is conceded. The motion is to suspend the action and trial till the war comes to an end. Two questions have been argued. The first is, whether the plaintiff is so identified with her husband by reason of the Naturalization Act that if he had no present *locus standi* to maintain an action, his wife is under a similar disability. This I do not deem it necessary to decide.

The second is whether, under the statute of 1914 and order in council thereunder, the plaintiff is entitled to sue, no order for deportation having been made, and she and her husband having been duly registered, and there having been no violation of the terms of the permit or infringement of the restriction of residence and locomotion.

The Act 43 Geo. 3, c. 155, contained elaborate provisions as to passports, registration, and licences. Being at large without licence was made an offence, and a licence was *ipso facto* invalidated if the alien went outside the prescribed district. Resident enemy aliens were then few. At present their number is very large. The Act of 1914 omits all reference to licences; and the point before us is whether registration, with permit in a prohibited area, is to be deemed equivalent to a licence or permission to reside within the prescribed district, entitling the alien to the protection of the King's peace, and to ask for redress if his rights in respect of person or property have been violated.

I am of opinion that the statute and order recognize the right of a registered alien to reside within the limited area. His residence there is lawful, and he is entitled to the protection of our law civilly as well as criminally. It is the interest of the

State that the alien should continue to earn his livelihood, and not be added to the ranks of the unemployed. It would be a cruel kindness to give him restricted liberty, and to deprive him of the means of enjoying it. The orders in council, 5th August, sect. 22, and 9th September, sect. 21 (c), plainly contemplate the alien, without any special licence, carrying on business here. See also *Janson's Case* (1) and *Wells v. Williams* (2). That wrongs, however outrageous, could be perpetrated on him with practical impunity during war, and that his redress should be confined to the chance of his surviving the war—*actio personalis moritur cum persona*—appears a most unlikely intention. The probable reason that licences were not specifically provided for as in the Act of 43 Geo. 3, c. 155, was on account of the immense number of resident aliens to be dealt with. The necessary inference from the recent compendious legislation is, that the registered alien is permitted by lawful authority to reside in the district; such permission carries with it civil rights in respect of person, character, or otherwise. *Sparenburgh v. Bannatyne* (3) is an interesting authority on the subject. Rooke, J., there indicated that a resident prisoner of war might sue. The exact point before us has been decided by Sargent, J., in the *Princess Thurn and Taxis Case* (4), whose reasoning I adopt. The motion, therefore, must be refused with costs; the action will be allowed to proceed.

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DODD, J.:—

I concur in the judgment given, for the reasons given. It is now the considered judgment of the court, following the judgment of a very learned judge in England, whose decision I should in any case have been ready to follow.

Solicitor for the plaintiff: *Patrick J. Moran*.

Solicitors for the defendants: *H. T. Dix & Sons*.

A. E. C.

(1) [1902] A. C., at pp. 505-6.

(2) 1 Ld. Raym., 282.

(3) 1 Bos. & P. 163.

(4) 31 T. L. R. 24.

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[APP., 29]

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- *Thurn and Taxis (Princes v. Moffitt)*, 31 T. L. R. 24, followed - 543
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— Summary Conviction—Omission in Summons—Defendant not prejudiced—Defect cured by 40 & 41 Vict. c. 56, s. 76—Certiorari refused 178, 181, note
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— Labourers employed in repair of road—Liability of county council for contributions under National Insurance Act, 1911 [110, 120, note
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— Justices—Omission in summons—Defendant not prejudiced—Defect cured by 40 & 41 Viet. c. 56, s. 76—Certiorari refused
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— Justices—Several offences charged in summons—One conviction - - - 150
See JUSTICES. 7.

COPY—Certificate by Home Secretary of re-admission to British Nationality—Copy purporting to be certified by Under-Secretary—Admissibility.
See JUSTICES. 5.

CORROBORATION—Action for criminal conversation—Testimony of plaintiff's wife sole evidence against defendant - 183
See CRIMINAL CONVERSATION.

COSTS—Taxation—Action which could have been brought in County Court—Costs of more than two counsel—Effect of absence of certificate for, in subsequent proceedings—Certificate given on day after trial—Order LXV, Rule 65, sub-rule 41.] It is provided by Order LXV, Rule 65, sub-rule 41, that "the costs of more than two counsel shall not be allowed in causes or matters which in the case of a plaintiff, having regard to the amount recovered . . . could have been brought in the County Court, unless the Judge at the trial shall certify under his hand, on the certificate of the registrar or other proper officer, that more than two counsel were reasonable or proper . . ." The

COSTS—continued.

plaintiff obtained a verdict for £40 in an action of negligence tried by a judge and jury. The judge gave a certificate, allowing three counsel, on the morning following the day on which the trial had concluded, which was held by the Court of Appeal to be too late. *Held*, by the Court of Appeal (reversing the decision of the King's Bench Division), that the provision in sub-rule 41, disallowing the costs of more than two counsel in the absence of a certificate, is not confined to the trial of the action, but applies to subsequent proceedings; and that the plaintiff could not be allowed the costs of more than two counsel on an application to the King's Bench Division for a new trial and an appeal from their decision to the Court of Appeal. *Flanagan v. Dublin United Tramways Company, Limited* - - - K.B., 160; App., 169

— Certiorari—Costs of unsuccessful prosecutor.
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— Solicitor—Charging order—Property recovered or preserved—Sum over which client appointed receiver by way of equitable execution - - - 31
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COTTAGE—Cottier tenancy—Breach of agreement to keep in repair—Right of action
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— Preferential right to—Labourers (Ireland) Acts—Right of action - - - 15
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COTTIER TENANCY—Agreement by lessors to keep in repair—Cottage becoming unfit for habitation—Right of action upon agreement - - - 81
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COUNTY COURT—Civil bill ejectment for non-payment of rent—Removal into Superior Court - - - 97
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— Civil-bill ejectment on title—Decree for possession unexecuted—Declaration of title—Estoppel—Statute of Limitations See LIMITATIONS, STATUTE OF. [135]

COUNTY SURVEYOR—Repair of roads entrusted to contractor—Labourers appointed by county surveyor, paid by and bound to obey orders of contractor as well as surveyor—Legality of contract—Liability of county council to pay contributions under National Insurance Act, 1911, in respect of labourers - 110
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— Road given in charge of, by county council—Contractor employed by county surveyor—Liability of county council for contributions under National Insurance Act, 1911, in respect of labourers 120, note
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COVENANT—Running with the land—Rent—Fee-farm grant—Grantees holding in severalty—Joint and several covenant by grantees to pay entire rent—Liability of assignee of one of grantees—Covenant running with the land—Privity of estate.] A fee-farm grant made under the Renewable Leasehold Conversion Act to several persons contained a joint and several covenant on the part of the grantees to pay the entire rent reserved by the grant. As between themselves the grantees held their respective shares of the lands in severalty, each paying an apportioned part of the rent. All the estate and interest of one of the grantees in the lands subsequently became vested in the defendant. An action having been brought against the defendant, as such assignee, to recover the entire rent: *Held*, that the defendant was liable only for such proportion of the rent as was applicable to the share of the lands which had become vested in her. *Dooner v. Odium* - - - K.B., 411

CRIMINAL CONVERSATION—Evidence—Testimony of plaintiff's wife sole evidence against adulterer—Corroboration.] There is no rule of law precluding a jury in an action for criminal conversation from acting on the uncorroborated evidence of the plaintiff's wife as to acts of adultery committed with the defendant. *Morrow v. Morrow* - - - K.B., 183

CRIMINAL LAW—Practice—Jurors book—Inherent jurisdiction of Court—Application to quash the panel.] Where the record of a criminal trial has been moved into the King's Bench, the Divisional Court will not entertain an application made to its inherent jurisdiction to quash the

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panel on the ground that the jurors book is irregular. The Court declined to order an inspection of the jurors book. *Rex v. Ryan*

[K.B., 283]

2.—Statute of Northampton (2 Edw. 3, c. 3)—“Riding or going armed”—Form of indictment under the statute—Necessity to negative lawful occasion and to aver “in terrorem populi”—Charge of acting so as to be a nuisance to and to alarm public lawfully using the public road—Evidence—No person on road.] An indictment for riding or going armed against the form of the Statute of Northampton (3 Edw. 3, c. 3), which omits to negative lawful occasion, is bad, as omitting an essential ingredient of the offence, and will not be cured by verdict. Counts in an indictment charging that the accused went about on a public road without lawful occasion, in such a manner as to be a nuisance to, and to alarm the public lawfully using the road, and charging that the accused on the public road unlawfully discharged a revolver to the great danger of the public, even assuming that the omission of the words, “lawfully using the highway,” does not make the latter count bad, cannot be sustained where it appears that none of the public were present or capable of being alarmed or endangered. *Quære*—Whether the omission of the averment that the acts were done in *terrorem populi* would be aided or cured by verdict? *Rex v. Smith*

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CROWN DEBT—Priority in bankruptcy—Telephone rent - - - 29
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CUSTOMS—Prohibition of importation of arms into Ireland—Proclamation—Seizure—Forfeiture—Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 43.] Sect. 43 of the Customs Consolidation Act, 1876, provides that “The importation of arms, ammunition, gunpowder, or any other goods may be prohibited by proclamation or order in council.” *Held* (by Cherry, L.C.J., and Dodd, J., Kenny, J., diss.) that in a proclamation under the section the area into which importation is prohibited may be limited, and that a royal proclamation prohibiting the importation of arms, ammunition, and the component parts of arms, empty cartridge-cases, explosives, and combustibles for warlike purposes into Ireland, was valid under the authority of the section. *Held* also, by Cherry, L.C.J., and Dodd, J., that where goods are imported in violation of such a proclamation, the fact that a customs officer who seizes the goods causes or permits them to be destroyed before any legal proceedings are taken, does not give the owner of the goods any right of action against him. *Hunter v. Coleman* - - - K.B., 372

DANCING—Conviction for using a room for public dancing without a licence—Omission in summons to state that room was ordinarily so used, or that defendant was occupier—Defendant not prejudiced—Certiorari refused - - - 181, note
See JUSTICES. 4.

DECLARATION OF TITLE—Unexecuted civil-bill decree for possession - 135
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DIRECT LABOUR—County council—Maintenance of roads—Contributions under National Insurance Act—Whether district or county-at-large charge - 489
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DISCHARGING ORDER—Garnishee order made absolute—Mistake - - - 63
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DISCOVERY—Specific document—Application *ex parte* - - - - - 206
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DISTRICT COUNCIL.
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DOCUMENT—Discovery—Specific document—Application *ex parte* - - - 206
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DUPLICITY—Several offences charged in summons—One conviction - 150
See JUSTICES. 7.

DWELLING-HOUSE—Room whether occupied as - - - - - 432
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EDUCATION—Charity—Poor rate—Exemption—Hereditaments used for educational purposes, not being for education of the poor - - - - - 447
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—Irish Education Act, 1892—Attendance Order—Form of - - - - - 69
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EJECTMENT.
See under ACTION FOR RECOVERY OF LAND.

ELECTION—Rural District Council—Nomination paper—Misnomer - - - 243
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EMPLOYER AND WORKMAN—Compensation—Accident arising out of and in the course of employment—Death resulting from accident when under the influence of drink—Mate of vessel—Fall from bridge of vessel after having been ordered below as unfit for duty—*Workmen's Compensation Act, 1906* (6 Edw. 7, c. 58), s. 1, sub-s. 1.] *C.* was mate of a steamship. He came on board at night heavily under the influence of drink, and went on the bridge, where, as was his duty, he took the wheel. Owing to his dangerous steering the master ordered him below as not being fit for duty. *C.* remained for eight or ten minutes at the head of the ladder leading to the deck. A thud was shortly afterwards heard, and *C.* was subsequently found at the foot of the ladder with a wound on his head, from which death subsequently resulted. No one saw him fall. Upon an application for compensation under the *Workmen's Compensation Act, 1906*, the county court judge held that the accident arose out of and in the course of the employment. He also found that it was attributable to *C.* being heavily under the influence of drink, but that as death had resulted this did not bar the right to compensation, which he accordingly awarded. *Held*, on appeal, that there was no evidence that the accident arose out of the employment, and that the decision of the county court judge should be reversed. *Murphy v. Cooney* - - - - - APP., 76

2.—Compensation—Contract of service—Relation of master and servant—Employee of Board of Guardians appointed subject to approval of Local Government Board—"Accident"—Workman employed in removing sewage contracting typhoid fever—*Workmen's Compensation Act, 1906* (6 Edw. 7, c. 60), s. 1, sub-s. 1, s. 13.] A workman employed by a Board of Guardians, who have the right of directing him in his work and of dismissing him at their own pleasure, and who are liable to pay his wages, is a servant of such Board within the *Workmen's Compensation Act, 1906*, although the appointment of such workman by the Board of Guardians, and the amount of his wages, require the approval of the Local Government Board. *Doran v. Guardians of Waterford Union* (37 I. L. T. R. 158) approved of. *Murphy v. Guardians of Enniscorthy Union*, [1908] 2 I. R. 609, and *In re National Insurance Act, 1911, Officers of South Dublin Union*, [1913] 1 I. R. 244, distinguished. A workman was employed as a machinery attendant, and part of his duty consisted in removing sewage out of the machinery. After having been engaged several years in this employment, he contracted typhoid fever, of which he died. Medical evidence was given that he might have acquired the disease by handling the sewage, but no evidence was given that the

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removal of the sewage was the cause of the disease. *Held*, that the evidence did not establish that the death resulted from an accident in the course of the employment, and that there was no right of compensation under the Workmen's Compensation Act, 1906. *Finlay v. Guardians of Tullamore Union* - - - - - APP., 233

3.—Conspiracy—Procuring breach of contract of employment—Dispute between employer and other employers—Trade Disputes Act, 1906

(6 *Edw. c. 47*), s. 3; s. 5, sub-s. 3.] The plaintiff was a stevedore who, in order to carry out his contracts for the discharge of cargoes, hired dock labourers, many of whom were members of a trade union known as the Irish Transport Union. The other stevedores of the port had formed a Stevedores' Association for the purpose of compelling ship-owners to pay higher rates, which association the plaintiff had refused to join. The defendants, some of whom were officials of the Irish Transport Union, and the others of whom were stevedores who had joined the Stevedores' Association, entered into an agreement to force the plaintiff to join the Stevedores' Association; and in pursuance of this agreement the defendants procured dock labourers who had been employed by the plaintiff to break their contracts and leave his employment, causing actual money loss to the plaintiff. There was no dispute between the plaintiff and the dock labourers, the dispute being one between the plaintiff and the Stevedores' Association, into which the stevedores brought the defendants, the officials of the Transport Union. *Held*, by the Court of Appeal, affirming the decision of the King's Bench Division, that the acts of the defendants were not done in contemplation or furtherance of a "trade dispute" within the meaning of the Trade Disputes Act, 1906, and were actionable. *Long v. Larkin*.

[K.B., 285; APP., 329]

4.—Security for costs—Appeal—Workmen's Compensation Act, 1906—Order LVIII, Rule 15.]

Upon an appeal from an order of the Recorder of Belfast, under the Workmen's Compensation Act, 1906, refusing a workman's request to review "without liberty to apply," the respondent-employers applied for an order directing the appellant to lodge security for costs of appeal. *Held*, that having regard to the policy of the Workmen's Compensation Act, 1906, it is not the practice in Ireland to require a workman to lodge security for the costs of his appeal to the Court of Appeal. *Stormount v. Workman, Clarke & Co., Limited*, [1914] 2 I. R. 532, note, followed. *Hutchinson v. New Northern Spinning and Weaving Company, Limited* - - - - - APP., 530

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— Contract of service—Labourers employed in repair of road—Liability of County Council for contributions under National Insurance Act, 1911 110; 120, note
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ENTRY—Lands Clauses Acts—Fee-farm conversion grant—Entry on lands without consent of grantor - - - 1
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ESTOPPEL—Civil-bill ejectment on title—Decree for possession unexecuted 135
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EVIDENCE—Action for criminal conversation—Testimony of plaintiff's wife sole evidence against defendant - 183
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— Presumption as to existence of state of facts anterior to date when shown to exist—British subject alleged to have been naturalized in America—Certificate of re-admission to British nationality—Not conclusive as to prior foreign naturalization—Copy of certificate purporting to be certified by Under-Secretary—Admissibility.
See JUSTICES. 5.

EXCEPTIONS—Necessity to negative in indictment - - - - - 190
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FEE-FARM GRANT—Grantees holding in severalty—Joint and several covenant by grantees to pay rent—Liability of assignee of one of grantees—Covenant running with the land - - 411
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— Made under Renewable Leasehold Conversion Act—Nature of estate of grantor—Whether "owner" within Lands Clauses Consolidation Act—Liability of grantee for waste—Conversion of land into cemetery - - - - - 1
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— Remedies for recovery of rent—Retrospective operation of 14 & 15 Vict. c. 20 - 97
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FISHERIES ACTS—5 & 6 Vict. c. 106, s. 74
Having in possession unclean salmon—Must be wilfully—Summary conviction—Omission of word "wilfully" in summons—Defendant not prejudiced—Certiorari refused - - - 178
See JUSTICES. 3.

- FORESHORE**—Removal of shingle—Prohibition by Board of Trade—Right of owner of foreshore—Jurisdiction of justices
See JUSTICES. 1. [125]
- FRANCHISE**—Service franchise—Married officers living in barracks - 432
See PARLIAMENT.
- FRAUDULENT PREFERENCE**—Payment by cheque on eve of bankruptcy—Cheque given in substitution for former uncashed cheque - - - 356
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- GAMING**—*Unlawful gaming—Automatic machine—Game of chance—Chances not equal alike to all players—Gaming Act, 1845 (8 & 9 Vict. c. 109), s. 2—Gaming Houses Act, 1854 (17 & 18 Vict. c. 38), s. 4.]* The appellant was convicted of using his premises for the purpose of “unlawful gaming” being carried on thereon. Proof was given of the user on the appellant’s premises of an automatic machine. On the insertion of a halfpenny in the machine, a marble was released; which by the operation of a trigger manipulated by the player was shot up to the top of the machine, whence it descended through a series of pins which deflected its course. The player, while the marble was falling, tried to bring beneath it a cup in the machine. The cup was fixed to a movable lever which could be moved laterally right or left at the option of the player. The object of the player was to catch the marble in the cup. If he succeeded, by an automatic action a disc was released which entitled him to a pennyworth of the appellant’s goods; if he failed, the halfpenny inserted became the property of the appellant without any return to the player. Proof was given of the user of the machine on the appellant’s premises, and he was convicted under 17 & 18 Vict. c. 38, s. 4. The justices found that the game played with the machine was predominantly one of chance; that skill did not enter substantially into the game; that, having regard to the players contemplated by the appellant as using the machine, the chances were not alike equal to all the players, including the appellant; that the chances were in the appellant’s favour; and that the game could not be converted from one of chance to one of skill. Upon a case stated by the justices: *Held*, that the findings of the justices as to the character of the game played with the machine were questions of fact, and consequently not reviewable by the Court, and that the finding by the justices that the game was one of chance, and one in which the chances were not alike equal to all the players, including the appellant, brought the game within the provisions of 8 & 9 Vict. c. 109, and, consequently, that the game played with the machine was unlawful
- GAMING**—*continued.*
gaming within the provisions of 17 & 18 Vict. c. 38, s. 4, and the appellant was rightly convicted. *Fielding v. Turner* ([1903] 1 K.B. 867) applied and followed. *Donaghy v. Walsh* - K.B., 261
- GARNISHEE ORDER**—No cause shown by garnishee by mistake—Order made absolute—Jurisdiction to set aside order 63
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- GOOD BEHAVIOUR**—Sureties for—Justices—Bona fide question of title—Showing jurisdiction on face of order - 156
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- GRAND JURY CESS**—Half-rents - 33
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- HACKNEY CARRIAGE**—Plying for hire without a licence—Procedure under Petty Sessions (Ireland) Act, 1851, not applicable - - - 103
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- HALF-RENTS**—Limerick Improvement Act, 1853—General Purposes Rate—Premises used exclusively for public purposes 33
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- HARBOUR**—Removal of shingle—Prohibition by Board of Trade—Right of owner of foreshore—Jurisdiction of justices 125
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- HIGHWAY**—Motor car—Reckless and dangerous driving - - - 150
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- Nuisance—Indictment—Going armed on public road so as to alarm public—No one on road at time—Discharging arms to danger of public—Necessity to add “lawfully using the highway” - 190
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- HUSBAND AND WIFE**—Criminal conversation—Evidence—Uncorroborated testimony of wife - - - 183
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- IMPORTATION**—Prohibition of importation of arms into Ireland—Validity of proclamation - - - 372
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- INDICTMENT.**
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- INSPECTION**—Criminal trial—Record removed into King’s Bench Division—Application to Divisional Court for order to inspect jurors book - - - 283
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- INSURANCE (NATIONAL)**—County Council—Labourers employed in repairs of roads—Liability of County Council to pay contributions under National Insurance Act, 1911 - - - 110; 120, note
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- County Council—Maintenance of roads—
 Direct labour—Roads other than main
 roads—Contributions under National In-
 surance Act, 1911—whether district or
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See LOCAL GOVERNMENT. 5.

INTERNATIONAL LAW—*Right of alien enemy to maintain action—Aliens Restriction Act, 1914 (4 & 5 Geo. 5, c. 12)—Aliens Restriction (Consolidation) Order, 1914.* An alien enemy duly registered under the provisions of the Aliens Restriction Act, 1914, and Order made thereunder, and residing in a prohibited area of the United Kingdom under a permit, may sue in the Courts in this country, notwithstanding the existence of a state of war between this country and the country of the alien. *Princess Thurn and Taxis v. Moffitt* (31 T. L. R. 24) followed. *Volke v. Rosunda Hospital* K. B., 543

IRISH EDUCATION ACT, 1892—Attendance Order—Form of order - - 59
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JUDGMENT—Vacating—Postponement of Payments Act, 1914—Proclamations—Writ issued during suspensory period 535
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JURISDICTION—Justices.

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JURORS BOOK—Criminal trial—Record removed into King's Bench Division—Application to Divisional Court to quash panel - - - 283
See CRIMINAL LAW. 1.

JURY—Common law action—Right to trial by jury - - - 533
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JUSTICES—*Summary Jurisdiction—Bona fide claim of right—Seashore—Removal of sand—Prohibition by Board of Trade—Right of owner—Harbours Act, 1814 (54 Geo. 3, c. 159), ss. 14 and 28.* Section 14 of the Harbours Act, 1814, as amended by s. 16 of the Harbours Transfer Act, 1862, provides that no person shall, without rendering himself liable to a penalty, take any shingle from the shore of any harbour from which the Board of Trade shall by order prohibit the taking of shingle; and s. 28 provides that nothing in the Act shall take away any right of property possessed by any person in the shores of a harbour. The Board of Trade, in pursuance of the powers conferred on them by the Acts, issued an order prohibiting the taking or removing of any shingle or ballast from the shores or banks of the

JUSTICES—*continued.*

sea, between certain points at Malahide. The appellant, owner in fee of the *locus in quo*, prosecuted the defendant, one of his agricultural tenants, for having, in contravention of the statute, removed ballast from the shores of the port of Dublin, within the points indicated in the order of the Board of Trade. The defence set up by the respondent was, that as tenant he had always drawn gravel and sand off the foreshore, and that he enjoyed a right of property within the meaning of s. 28. The magistrates declined jurisdiction, on the ground that a bona fide question of title was involved. *Held*, that the magistrates were right in declining jurisdiction. *Burton v. Hudson*, [1909] 2 K. B. 564, followed. *Anderson v. Jacobs* (93 L. T. 17) distinguished. *Lord Tulbot de Malahide v. Dunne* - K. B., 125

2. — *Summary jurisdiction—Bona fide question of title—Order to find sureties for the peace and good behaviour—Showing jurisdiction on face of order.* The fact that threats, or an assault, which would authorize justices in requiring sureties for the peace and good behaviour, arose by reason of a bona fide dispute as to title, does not oust the jurisdiction of the justices to require such sureties. An order of justices, setting out a complaint that defendant used threatening language to complainant, thereby putting him in fear and dread of the defendant, and ordering the defendant to enter into recognizances to keep the peace and be of good behaviour, sufficiently shows on its face jurisdiction to make such order. *The King (Boylan) v. Justices of Londonderry*, [1912] 2 I. R. 374, explained. *Rez (Mulholland) v. Justices of Monaghan* - - - K. B., 156

3. — *Summary jurisdiction—Certiorari—Conviction—Omission in summons—Defect cured—Unclean salmon—Statute—Construction—How far word "wilfully" governs subsequent words—Fisheries (Ireland) Act, 1842 (5 & 6 Vict. c. 106), s. 74—County Officers and Courts (Ireland) Act, 1877 (40 & 41 Vict. c. 56), s. 76.* By s. 74 of the Fisheries (Ireland) Act, 1842, it is enacted that if any person shall wilfully take, kill, destroy, expose to sale, or have in his possession any unclean salmon, he shall forfeit a sum not exceeding £2 for every such fish so taken, &c. *Held*, that the word "wilfully" governs the words "have in his possession," and that a conviction on a summons charging the defendant with having in his possession unclean salmon, but omitting the word "wilfully," was bad. But *held*, that as it appeared that the justices had in fact determined on the hearing of the summons that the defendant had the salmon wilfully in his possession, and the Court being of opinion that the omission of the word "wilfully" from the summons did not mislead or prejudice the defen-

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dant or affect the merits of the case, the Court, in obedience to s. 76 of 40 & 41 Vict. c. 56, would refuse, on certiorari, to quash the conviction. *The King (U. D. C. Athy) v. Justices of Kiblaro*, [1912] 2 I. R. 64, and *The King (Johnston) v. Justices of Belfast*, [1914] 2 I. R. 181, note, applied. *Rex (Sheehan) v. Justices of Waterford* [K. B., 178 (aff. C. A.).

4. — Summary jurisdiction—Certiorari—Conviction—Omission in summons—Defect cured—Charge of using room for public dancing—Omission of statement "room ordinarily so used"—Omission of statement that defendant was occupier—Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 51—County Officers and Courts (Ireland) Act, 1877 (40 & 41 Vict. c. 56), s. 76.] *Rex (Johnston) v. Justices of Belfast* K.B., 181, note

5. — Summary jurisdiction—Complaint dismissed—Right to have case stated—Evidence on behalf of defendant improperly admitted notwithstanding objection by complainant—Refusal of justices to state a case—Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43)—Alien—British subject alleged to have been naturalized in America—Certificate of Home Secretary of re-admission to British nationality—Not conclusive as to prior foreign naturalization—Copy of certificate—Admissibility—Presumption of existence of state of facts anterior to date when shown to exist.]

Where justices have dismissed a complaint, the Court will not grant a rule to compel them to state a case on the ground that evidence tendered on behalf of the defendant, and objected to by the complainant, was improperly admitted, the evidence given on behalf of the complainant being such as would have justified the justices in dismissing the complaint. *O.* was charged on summons with having, in June, 1913, acted as member of a county council when disqualified by reason of his being an alien. He was a natural-born British subject who had been in America for a number of years, and it was alleged that while there he had become a naturalized citizen of the United States. The evidence given on behalf of the complainant was:—(a) The statement of a witness that *O.* had some years previously told him he was a naturalized American citizen. (b) A copy of a certificate by the Home Secretary re-admitting *O.* to the status of a British subject as from the 10th September, 1913, which certificate recited that *O.* had presented a memorial alleging that he had become a naturalized American citizen and praying to be re-admitted to the status of a British subject. The copy purported to be certified by an under secretary of State, but no evidence was given of his signature or authority to issue a certified copy. Held, that even assuming that the copy of the certificate was admissible, the justices

JUSTICES—continued.

were not bound to convict on the evidence. There is no presumption of law that a state of facts has existed for any period anterior to the date when it is shown to exist. *Rex (Murphy) v. Justices of Cork* - - - - - K.B., 249

6. — Summary jurisdiction—Complaint—Summons sent to justice by complainant's solicitor in letter—Jurisdiction of justice to issue summons without further complaint—Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), s. 10.] A solicitor sent by post a summons, in which his clients were named as complainants, to a justice, accompanied by a letter stating that the summons was for the next petty sessions, and asking the justice to sign it. The summons set out the nature of the complaint, which would have justified the issue of a summons. Held, that the letter and the summons constituted a sufficient "complaint" within s. 10 of the Petty Sessions (Ireland) Act, 1851, and that the justice had jurisdiction to issue the summons. Where a solicitor states to a justice that he is instructed by his client to apply for a summons, and states to him matters which would justify the issue of the summons, the justice is bound to issue it, unless he disbelieves, or has reasonable grounds to doubt, the statement. *Irish Insurance Commissioners v. Trench* - - - - - K.B., 172

7. — Summary jurisdiction—Summons—Conviction—Uncertainty—Several offences charged in summons—One conviction—Motor Car Act, 1903 (3 Edw. 7, c. 36), s. 1, sub-s. 1—Several separate offences created by.] By s. 1, sub-s. 1, of the Motor Car Act, 1903, if any person drives a motor car on a public highway, "recklessly or negligently, or at a speed or in a manner which is dangerous to the public," he is guilty of an offence under the Act, and by s. 11, sub-s. 1, is liable on summary conviction to a fine not exceeding £50. *B.* was charged before justices, on a summons, with having driven a motor car on the public highway "recklessly at a speed and in a manner dangerous to the public." The justices made an order: "Defendant convicted, and fined £1." Held, following *Rex v. Wells* (68 J. P. 392), that driving recklessly, driving at a speed dangerous to the public, and driving in a manner dangerous to the public, were separate offences; but held also, that, as in Ireland separate offences may be charged in one summons, the conviction was good, as amounting to a conviction of each of the offences. *Rex (Neely) v. Justices of County Down*, 42 I. L. T. R. 111, distinguished. *The King (Cahill) v. Justices of Dublin*, [1904] 2 I. R. 638, and *Rex (Ross) v. Justices of Borough of Cork*, 42 I. L. T. R. 230, considered. *Rex (Burrows) v. Justices of Cavan* K. B., 150

8. — Summary jurisdiction—Summons—Default of appearance—Reasonable time for service—

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Offence against Licencing Acts—Licensed person abroad—Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), s. 20, sub-s. 2. The reasonable time for the service of a summons mentioned in sect. 20, sub-s. 2, of the Petty Sessions (Ireland) Act, 1851, means a reasonable time for enabling the defendant to present his defence, if any, and does not necessarily connote that the summons has been brought personally to the knowledge of the defendant. Where a publican is abroad, he ought to have on the premises a person who for the purposes of his statutory obligations fully represents him, on whom, in proceedings for an offence under the Licencing Acts, service of a summons can be effected. *Rex (Lambe) v. Justices of Louth* - - - K. B., 54

9.—*Summary jurisdiction—Towns Improvement (Ireland) Act, 1854 (17 & 18 Vict. c. 103) ss. 80, 90, 91—Plying for hire with hackney carriage without a licence—Procedure under Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), not applicable—Order of justices imposing imprisonment in default of payment of penalty—Necessity of using words “unless penalty and costs sooner paid”—Certiorari—Costs of unsuccessful prosecutor.* Proceedings before justices to recover the penalty imposed by s. 80 of the Towns Improvement (Ireland) Act, 1854, on a person found plying for hire with a hackney carriage without a licence, are governed by that Act, and not by the Petty Sessions (Ireland) Act, 1851. *R. (McErlean) v. Justices of Lutrim*, 2 New Ir. Jur. Rep. 256, does not go the length of deciding that, in an order of justices imposing imprisonment in default of payment of a fine, the words “unless the penalty shall be sooner paid,” should be in the order, as distinct from the commitment. *G.* was charged before justices with plying for hire with a hackney carriage within the prescribed distance without a licence, an offence in respect of which a penalty is imposed by s. 80 of the Towns Improvement (Ireland) Act, 1854. The justices made an order, which was entered in the order book, that *G.* should pay for fine £1 and 5s. for costs, and in default of payment should be imprisoned for fourteen days. The order as entered did not contain the words “unless such penalty and costs shall be sooner paid.” No formal conviction under the hands and seals of the justices, as prescribed by s. 91 and Schedule C of the Act of 1854, was drawn up. *G.* having applied for a writ of certiorari to quash the order as entered in the order-book, on the ground that it was bad on its face: *Held*, that the proceedings to recover such penalty were governed by the Towns Improvement (Ireland) Act, 1854, and not by the Petty Sessions (Ireland) Act, 1851, and that certiorari did not therefore lie in respect of the

JUSTICES—continued.

entry in the order book. *Held*, also, that there was no jurisdiction to give *G.* the costs of the application, but that it should be refused without costs. *Rex (Grant) v. Justices of Louth*.

[K. B., 103

10.—*Summary jurisdiction—Warrant—Jurisdiction of justices to re-issue—Application of Petty Sessions (Ireland) Act, 1851, to the Charitable Loan Societies (Ireland) Acts—Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93)—Charitable Loan Societies (Ireland) Acts, 1843, 1900, 1906 (6 & 7 Vict. c. 91; 63 & 64 Vict. c. 25; 6 Edw. 7, c. 23.)* The decision in *Atthill v. Woods*, [1903] 2 I. R. 305, and the enactment in s. 1, sub-s. 1, of the Charitable Loan Societies (Ireland) Act, 1906, establish that the provisions of the Petty Sessions (Ireland) Act, 1851, apply to proceedings under the Charitable Loan Societies (Ireland) Acts; and therefore the power given to a justice by s. 33 of the Petty Sessions Act, to re-issue a warrant, or issue a fresh warrant, applies to distress warrants issued under the Charitable Loan Societies (Ireland) Acts. The jurisdiction given by s. 33 of the Petty Sessions Act to re-issue a warrant, or issue a fresh warrant, is not limited to the cases mentioned in the section of the person to whom the warrant was addressed being unable to find the person against whom the warrant issued or his goods, or to discover where such person or his goods are to be found. The jurisdiction may be exercised although the person to whom the warrant was addressed has not given the certificate mentioned in the section stating the reasons why the warrant was not executed, and without such person being examined on oath touching the non-execution of the warrant. The jurisdiction given by the section is not necessarily confined to the first warrant. *Rex (Shields) v. Justices of Tyrone*

[K. B., 89

— Irish Education Act, 1892 — Attendance Order—Form of - - - 59
See SCHOOLS.

— Licencing Acts.

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— Unlawful gaming—Using premises for—
Automatic machine—Chances not equal
alike to all players - - - 261
See GAMING.

LABOURERS (IRELAND) ACTS.

See under LOCAL GOVERNMENT.

LAND—Recovery of.

See ACTION FOR RECOVERY OF LAND.

LANDLORD AND TENANT—Labourers (Ireland) Acts—Cottage let to labourer by sanitary authority—Agreement by lessors to keep in repair—Cottage becoming unfit for habitation—Right of action upon agreement—Collier tenancy—Statutory

LANDLORD AND TENANT—continued.

remedy to withhold rent not exclusive remedy—*Labourers (Ireland) Act, 1883* (46 & 47 Vict. c. 60), s. 13—*Landlord and Tenant Law Amendment Act (Ireland), 1860* (23 & 24 Vict. c. 154), s. 83.] By the *Labourers (Ireland) Act, 1883*, sect. 13, the power of a sanitary authority to make lettings of cottages erected by them under the Act is "upon such terms and conditions that the tenancies created by such lettings shall be cottier tenancies within the meaning of the *Landlord and Tenant Law Amendment Act, 1860*." By s. 83 of the latter Act the landlord of a cottier tenancy is bound to keep and maintain the house in tenantable condition and repair; and in case it shall be proved that by the landlord's default it is unfit for occupation by reason of the want of such repairs, "no rent or compensation for the occupation of the said tenement during the time it shall continue in such state and condition shall be recoverable." The defendants, a sanitary authority, having acquired a plot of land under the *Labourers (Ireland) Acts*, and erected a cottage on it, let the cottage to the plaintiff, an agricultural labourer, by an agreement in writing which provided that the lessors should keep the premises in tenantable condition and repair during the tenancy. The defendants allowed the cottage to get into disrepair, so that it became unfit for habitation. *Held*, that the plaintiff had a right of action against the defendants for damages for breach of the agreement to keep in repair, and was not confined to the statutory remedy given by the *Act of 1860*. *Counihan v. Scuiriff Rural District Council*

[K.B., 81]

— Civil-bill ejectment for non-payment of rent
— Removal into superior Court - 97

See ACTION FOR RECOVERY OF LAND.

— Fee-farm grant—Grantees holding in severalty—Joint and several covenant by grantees to pay rent—Liability of assignee of one of grantees—Covenant running with the land - - 411

See COVENANT.

LANDS CLAUSES ACTS—Compulsory powers

—"Owner"—Grantor of fee-farm conversion grant—Grantee's interest acquired by agreement—Entry on lands without grantor's consent—Action by grantor for wrongful entry and waste—*Lands Clauses Consolidation Act, 1845* (8 & 9 Vict. c. 18), s. 84—*Belfast Corporation Act, 1911* (1 & 2 Geo. 5, c. cxc), ss. 3, 39—*Renewable Leasehold Conversion Act* (12 & 13 Vict. c. 105), ss. 7, 20.] Sect. 84 of the *Lands Clauses Consolidation Act, 1845*, enacts that the promoters of an undertaking shall not, except by consent of the "owners and occupiers," enter upon any lands which they are empowered to purchase until they shall either

LANDS CLAUSES ACTS—continued.

have paid to every party "having any interest" in such lands, or deposited in the bank, the purchase-money or compensation agreed or awarded to be paid to such parties respectively for their respective interests therein. *Held*, that the owner and occupier who may consent to entry are not identical with all persons interested; and that the estate of a grantor of a fee-farm grant, made under the *Renewable Leasehold Conversion Act*, was not such as to make him owner of the lands within the meaning of sect. 84. *Held*, also, that liability for waste under such fee-farm conversion grant does not extend to everything which could be deemed waste as between landlord and tenant, and that although as between landlord and tenant the conversion of land into a cemetery would have been restrained, such use of his fee-simple estate by a grantee of such grant was not actionable waste. *Bell v. Belfast Corporation*

[K.B., 1.

LEASE—Rent—Covenant running with the land
See COVENANT. [411]

LICENSING ACTS—Licensed premises—

Business other than sale of intoxicating liquors carried on—Billiard-room—Structural separation—Intoxicating Liquors (Ireland) Act, 1906 (6 Edw. 7, c. 39), s. 2.] Keeping a billiard-room for the purpose of profit is carrying on a business within the meaning of sect. 2 of the *Intoxicating Liquors (Ireland) Act, 1906*. Such billiard-room is not a "place of public amusement" within the exception in the section. *Mercer v. O'Shaughnessy*

[K.B., 74, note

2. — *Licensed premises—Business other than sale of intoxicating liquors carried on—Structural separation—Intoxicating Liquors (Ireland) Act, 1906* (6 Edw. 7, c. 39), s. 2.] A sale of drink consists in the order for the drink and the delivery of the drink in pursuance of the order. Where a publican carries on upon the licensed premises a business other than that of the sale of intoxicating liquors, and that portion of the premises used for the sale of such liquors is divided from the portion used for the purposes of such other business by a separation of such a character that, notwithstanding its existence, an effective order for drink can be given by a person in the latter portion to, and be received by, a person in the former portion of the premises, and drink can be supplied in pursuance of that order, such separation is not a "structural" separation within the meaning of sect. 2 of the *Intoxicating Liquors (Ireland) Act, 1906*. A separation between the bar of an hotel and a billiard-room (which is not licensed, but which is owned by the hotel proprietor and used for the purposes of profit) if it contain a glass partition through which a signal for drink can be given and received, resulting in the delivery of

LICENSING ACTS—continued.

the drink ordered by taking out the drink from the bar to the billiard-room through a yard, is not a "structural separation" within the above Act and section. *Beirne v. Duffy* - - K.B., 68

— Offence against — Summons — Publican abroad—Necessity of having person on premises to represent him for purpose of service of summons - - - 54
See JUSTICES 8.

LIMERICK IMPROVEMENT ACT, 1853—

General Purposes Rate—Premises exclusively used for public purposes—Half rents - - - - - 33
See RATES. 1.

LIMITATIONS, STATUTE OF—County

Court—Civil-bill ejectment on title—Estoppel—Effect of unexecuted decree for possession—Civil Bill Courts (Ireland) Act, 1851 (14 & 15 Vict. c. 57), ss. 76, 96, 139, 144—Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), ss. 2, 3.] An unexecuted decree for possession obtained in a civil-bill ejectment on the title is not a declaration of the plaintiff's title, nor does it give him a new title, or amount to an acknowledgment by the defendant of the plaintiff's title, or operate as an estoppel, so as to prevent the Statute of Limitations from running in favour of a defendant in actual occupation of the land. *Derham v. Doyle*

[APP., 135]

LOCAL GOVERNMENT—Election—Nomination

paper—Validity of—Name of candidate—Misnomer—County and Rural District Councilors (Ireland) No. 2 Election Order, 1899, Rules 4 (2) and 32—Mandamus.] A candidate for election as rural district councillor described himself in his nomination paper as Michael B. Walsh, the name in which he appeared in the register of voters, and which he always assumed, and signed in transactions requiring his signature. His mother's name was Barry, and he had added the initial "B," to the Christian name Michael, to distinguish him from others in the district named Michael Walsh. The deputy returning officer rejected the nomination paper on the ground that it did not comply with the terms of Rule 4, sub-sect. 2, of the County and Rural District Councilors (Ireland), No. 2, Election Order, 1899, by setting out the surname and other name or names in full. *Held*, that under the circumstances the name of the candidate was properly stated in accordance with Rule 4, sub-sect. 2, of the Election Order of 1899; that even assuming there was a misnomer, it was cured by Rule 32 of the said order; and that a peremptory writ of mandamus should issue to the deputy returning officer, directing him to include the prosecutor's name in

LOCAL GOVERNMENT—continued.

the list of candidates validly nominated. *Reg. v. Plenty* (L. R. 4 Q. B. 346) followed. *Mather v. Brown* (1 C. P. D. 596) distinguished. *Rex (Walsh) v. Cusey* - - - K.B., 243

2.—*Labourers (Ireland) Acts—Improvement scheme founded on representation signed by agricultural labourer—Right of action of labourer if not given preference on first letting—Plot suggested in representation not included in scheme—Omission of rural district council to make regulations for letting of cottages—Jurisdiction of Local Government Board as to selection of labourers for cottages—Labourers (Ireland) Act, 1906 (6 Edw. 7, c. 7), s. 29.]* Where land is acquired by a rural district council under an improvement scheme, made under the Labourers (Ireland) Acts and founded on a representation made on behalf of an agricultural labourer, such labourer has an action for damages against the district council, if guilty of a breach of their statutory obligation under sect. 29 of the Labourers (Ireland) Act, 1906, to give him a preference on the first letting of a cottage or allotment. The action lies notwithstanding the omission by the district council to make regulations, pursuant to sub-sects. 2 and 3 of such s. 29, providing for the giving of preference to agricultural labourers who have signed the representation on which the scheme is founded. The action lies notwithstanding that the particular plot suggested in the representation as a site for a cottage for such labourer is not included in the scheme. The selection of labourers for particular cottages is a matter outside the jurisdiction of the Local Government Board. *Tevlín v. Lisnaskea Rural District Council* - - - K.B., 15

3.—*National Insurance—County Council—Contract of service—Repair of roads entrusted to contractor—Labourer appointed by county surveyor, paid by and bound to obey orders of contractor as well as those of surveyor—"Contract of service"—Employer—National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 1, sub-s. 1, 2; Schedule 1, Part 1 (a).]* A county council entrusted the repair of certain roads to a contractor. The terms of the contract provided that the contractor should "keep" a surface-man, and pay him at a rate of wages prescribed by the county council; that the surface-labourers "will be appointed by the county surveyor, and may be dismissed by him at any time on just complaint from the contractor, or for other causes." According to the "instructions for surface-labourers," embodied in the contract, the surface-men were bound to attend closely to the orders of the assistant-surveyor, and to those of the contractor when the assistant had not given any particular instructions. The Irish Insurance Commissioners issued a summons

LOCAL GOVERNMENT—continued.

against the county council, as employers of the surface-men, for failure to pay the contributions under the National Insurance Act, in respect of the surface-men. *Held*, that the contract of service was between the contractor and the surface-men, and that accordingly the contractor, and not the county council, was liable for payment of the contributions.

Held, also, that where a county council enter into a contract for the repair of roads, they cannot legally reserve for the county surveyor, or for a person employed by him, the performance of part of that repair. *County Council of Down v. Irish Insurance Commissioners (Annet's Case; M'Connell's Case). Irish Insurance Commissioners v. County Council of Down (O'Neill's Case; M'Cartan's Case)* - - - - - K. B. 110

4. — *National Insurance—County Council—Contract of service—Work given in charge of county surveyor—Contractor employed by county surveyor—Liability of County Council to pay contributions under National Insurance Act, 1911, in respect of workmen employed by contractor—National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55) s. 1, sub-ss. 1, 2; Sch. I. Part 1 (a).]* A county council gave a road in charge to the county surveyor, who, instead of employing labourers himself, entered into a contract with B., by which B was to do the necessary work. The surface-labourers were to be appointed by the county surveyor, and might be dismissed by him, and were to follow the directions of the assistant-surveyor, but were to be paid by B. *Held*, that the work having been given into the charge of the county surveyor, as representative of the county council, it must be taken that the work was in charge of the county council, and that they, by their representative, selected the surface-labourers, and that therefore the county council was liable for the contribution payable under the National Insurance Act, 1911, in respect of such labourers. *County Council of Down v. Irish Insurance Commissioners (Malone's Case)*

[K. B., 120, note

5. — *National Insurance—County council—Maintenance of roads—Direct labour scheme—Labourers employed by county council—Insurance contributions—“Expenses connected with any public work in the district”—District charges—Local Government (Ireland) Act, 1898 (61 & 62 Vict. c. 37), s. 44—Local Government (Procedure of Councils) Order, 1899, as amended by the Local Government (Procedure of Councils) Order, 1901, confirmed by 1 Edw. 7, c. cxli, Art. 25A—National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), ss. 3 & 4.] Contributions payable by county councils under the National Insurance Act, in respect of labourers*

LOCAL GOVERNMENT—continued.

employed by them on the maintenance of roads under direct labour schemes, are, so far as the employers' share thereof is concerned, “expenses connected with any public work in the district,” within the meaning of sect. 44 of the Local Government (Ireland) Act, 1898, and are, where the roads are not main roads, exclusively a district and not a county-at-large charge. *Rex (County Council of Cork) v. Sheehan* - - - - K. B., 489

— *Contract of service—Relation of master and servant—Employee of Board of Guardians appointed subject to approval of Local Government Board—Accident—Workmen's Compensation Act, 1906* 233
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— *Labourers (Ireland) Acts—Cottage let to labourer by sanitary authority—Agreement by lessors to keep in repair—Cottage becoming unfit for habitation—Right of action upon agreement—Cottier tenancy—Statutory remedy to withhold rent not exclusive remedy* - 81
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— *Rates—County borough—General purposes rate—Half rents* - - - - 33
See RATES. 1.

— *Rates—County Council—Invalid rate—Distress by rate collector—Liability of rate collector—Liability of County Council*
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LOCAL GOVERNMENT BOARD — Jurisdiction to select labourers for cottages under Labourers (Ireland) Acts - 15
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MANDAMUS — Election for Rural District Council—Nomination paper—Misnomer.
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MASTER AND SERVANT — Invalid rate—Seizure by rate collector—Liability of County Council - - - 41, 495
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— *Loss of service* - - - - 276
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— *National Insurance Act* - - 110, 120, note
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— *Workmen's compensation.*
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MISNOMER — Local Government election — Nomination paper—Name of candidate
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- NEGATIVING EXCEPTIONS** — Indictment under Statute of Northampton, 2 Edw 3, c. 3 - - - 190
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- NEGLIGENCE**—Sub-postmaster—Liability for negligence in transmission of telegram
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- OFFICERS**—Quarters in barracks occupied by married officers—Whether occupied as dwelling-house - - - 432
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- PANEL**—Criminal trial—Record removed into King's Bench Division—Application to Divisional Court to quash panel—Application for order to inspect jurors book
See CRIMINAL LAW. 1. [283]
- PARLIAMENT**—Registration of voters—Service franchise—Married soldiers living in barracks—Representation of the People Act, 1884 (48 Vict c. 3, s. 3.) Married officers and non-commissioned officers occupied during the qualifying period, with their wives and families, quarters in barracks allotted to them. They took their meals in their quarters; each had a key, and could go in and out of his quarters during the day without hindrance. The quarters consisted of a sitting-room, with one or more bedrooms, and scullery. The barracks were subject to military control; the commanding officer, who lived outside the barracks, could move an officer to other quarters. Quarters were liable to inspection, and non-commissioned officers could not be out of barracks after midnight without a pass, and lights in quarters were to be put out at a certain hour. *Held*, reversing the decision of the revising barrister, that each officer or non-commissioned officer occupied his quarters as a dwelling-house by virtue of service, and was entitled to the franchise. *M'Daid v. Barton*, 4 Lawson 61, distinguished. *Steele v. Dowling* - App., 432
- PEACE**—Sureties for—Justices—Bona fide question of title—Showing jurisdiction on face of order - - - 156
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- PETTY SESSIONS (IRELAND) ACT, 1851**
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- PLEADINGS**—Order for trial without - 533
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- POOR RATE.**
See RATES.
- POST OFFICE**—Telegram—Negligence by sub-postmaster in transmission—Liability for injury resulting from negligence—Duty of sub-postmaster as a public officer.] A sub-postmaster, in transmitting a telegram, acts as a public officer and in the discharge of a public duty, and if he is guilty of negligence in the transmission of the telegram, causing loss to the sender, he is liable to the sender for the loss so sustained. *Rowning v. Goodchild*, 2 W. Bl. 906, applied and followed. *Hamilton v. Clancy* - - - K. B., 514
- POSTMASTER**—Liability for negligence in transmission of telegram - - 514
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— Telephone rent due to—Crown debt—Priority in bankruptcy - - - 29
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POSTPONEMENT OF PAYMENTS ACT, 1914—"Moratorium"—Proclamations postponing payment—Cause of action—Writ issued during suspensory period—Default of appearance—Dismissing action—Removing writ from file—Vacating judgment.] The effect of the proclamations made under the Postponement of Payments Act, 1914, was to give a statutory credit for the period mentioned therein, so that during such period no action was maintainable in respect of a debt coming within the proclamations. If during the suspensory period a writ has been issued, the plaintiff is not entitled to judgment, although no appearance has been entered; and the Court, on the facts being brought to its notice, will of its own motion either dismiss the action or remove the writ from the files of the Court. If judgment has been inadvertently allowed to be marked, such judgment will be set aside by the Court when brought to its notice, without requiring the defendant to institute a motion for the purpose. *Gramophone Company, Limited v. King. St. George and another v. Delury and another. Lube v. O'Shea.*

[K. B., 535]

PRACTICE — Discovery — Specific document — Application made *ex parte*. An application under Order XXXI, Rule 20 (3), for an order requiring a party to state by affidavit whether a specific document is or has at any time been in his possession or power may be made *ex parte*. *Henty & Gardner v. Beckett* - - - K. B., 206

2. — Garnishee Order—No cause shown by garnishee owing to mistake—Order made absolute—Jurisdiction of Court to set aside absolute order.] The plaintiff had obtained a garnishee order attaching a debt alleged to be due to the defendant by a county council, and calling on the county council to show cause why it should not be paid to the plaintiff. This order was served on the county council. Prior to the date of the order the debt had been assigned for value by the defendant to third parties, and notice of the assignment given to the county council. Owing to a mistake on the part of the secretary of the county council, no cause was shown against the conditional order, and it was made absolute. *Held*, that the Court had jurisdiction to set aside the absolute order, and that, in the special circumstances, it should be set aside. *O'Brien v. Killeen* - - - K. B., 63

PRACTICE—continued.

3. — Right to trial by jury—Common Law action—Jurisdiction to order trial by judge without jury—Order XIV, rr. 6, 8.] Upon a motion in the King's Bench Division for final judgment upon a specially endorsed writ, the Court made no rule on the motion, and, notwithstanding the objection of the plaintiff, ordered that the action be tried by a judge without a jury, and without the delivery of further pleadings. *Held*, by the Court of Appeal, that there was no jurisdiction to order the action to be tried without a jury when the plaintiff refused to consent to such an order. *Magill v. Magill* - - - APP., 533

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— Costs—Action which could have been brought in County Court—Costs of more than two counsels—Certificate—Time for giving—Effect of absence of certificate in subsequent proceedings - - - 160, 169
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— Costs—Charging order—Property recovered or preserved - - - 31
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— Criminal Law—Trial removed into King's Bench Division—Application to Divisional Court to quash jury panel—Application for order to inspect jurors book - - - 283
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— Postponement of Payments Act, 1914 — Proclamations—Writ issued during suspensory period — Dismissing action — Vacating judgment - - - 535
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PRESUMPTION—No presumption of law as to existence of state of facts anterior to date when shown to exist—Certificate of Home Secretary re-admitting to British nationality not conclusive as to prior foreign naturalization.
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See BANKRUPTCY. 2.

PUBLIC PURPOSES—Premises used exclusively for—Half-rents—General Purposes rate—Limerick Improvement Act, 1853
See RATES. 1. [33]

RATES — *County Borough — General Purposes Rate—Premises used exclusively for public purposes — Half-rents — Limerick Improvement Act, 1853 (16 & 17 Vict. c. xciv), ss. 37 and 39; Valuation (Ireland) Act, 1852 (15 & 16 Vict. c. 63), ss. 12, 26, and 27; Grand Jury (Ireland) Act, 1856 (19 & 20 Vict. c. 63), s. 2.* By the Limerick Improvement Act, 1853 (16 & 17 Vict. c. xciv), s. 37, all the powers theretofore exercised by or vested in the grand jury of the city of Limerick with respect to the presenting and levying of rates or cesses for local purposes within the borough of Limerick, were transferred to the council of the said borough; and, by sect. 39, the borough council were authorized to raise and levy a general purposes rate to make provision for all such purposes as, but for the Act, the grand jury would be empowered and bound to provide for out of the rates or cesses they were empowered to levy within the borough. Sect. 12 of the Valuation (Ireland) Act, 1852, includes half-rents among rateable hereditaments for the purposes of the Act; and sect. 26 enacts that all county or grand jury rates and assessments shall be levied according to the valuations in the final lists of rateable hereditaments made under the Act. Sect. 2 of the Grand Jury (Ireland) Act, 1856, enacts that half-rents shall be liable to grand jury rates and county cess. The borough council sought to make and assess the general purposes rate on half-rents received out of premises let and used exclusively for public purposes. *Held*, that grand jury cess could not have been assessed on half-rents in 1853, and therefore the Limerick Corporation, as the transferees of the powers of the grand jury, could not assess the general purposes rate on half-rents; that the Valuation (Ireland) Act, 1852, merely supplied the machinery of rating, and was not a taxing statute; and that, moreover, the words of sect. 2 of the Grand Jury (Ireland) Act, 1856, were tantamount to a declaration that prior to the passing of that Act half-rents were not liable to grand jury cess. *Limerick Corporation v. Kennedy* - - - K.B., 33

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2. — *County Council—Invalid rate—Distress — Liability of rate collector—Liability of County Council—Master and servant—Material evidence omitted to be given at trial—New trial not granted.* A rate collector had, in accordance with the terms of a warrant issued to him by the county council, carried out in an otherwise legal manner a seizure in respect of a rate which was bad. *Held*, by the King's Bench Division, that the rate collector was liable to an action for damages, but that the county council was not liable. *Held*, in the Court of Appeal by O'Brien, L.C., and Palles, C.B., Holmes, L.J., inclining to the same opinion, that where a county council issues a warrant to a rate collector authorizing and directing him to levy a rate which is invalid, and the rate collector, in pursuance of the warrant, levies the rate by distress, in such manner that the distress would have been lawful had the rate been valid, the county council, as well as the rate collector, is liable to an action for damages in respect of the illegal seizure. But *held*, that the decision of the King's Bench Division dismissing the action as against the county council, should be affirmed, on the ground that at the trial no evidence had been given of the issue of the warrant by them. *O'Neill v. Drohan and Waterford County Council* - - K.B., 41; App., 495

3. — *Poor rate—Exemption—Hereditaments used exclusively for charitable purposes—User for educational purposes, not being for education of the poor—Valuation (Ireland) Act, 1852 (15 & 16 Vict. c. 63), s. 15—Valuation (Ireland) Amendment Act, 1854 (17 & 18 Vict. c. 8), s. 2.* The words "charitable purposes" in sect. 15 of the Valuation (Ireland) Act, 1852, and sect. 2 of the Valuation (Ireland) Amendment Act, 1854, so far as they exempt from rating by reason of the user being educational, are limited to user for the education of the poor. *Quere*—Are the words confined to charitable purposes of a public character for the benefit of the entire community? The *dictum* in *Clancy v. Commissioner of Valuation*, [1911] 2 I.R. 173, at p. 180, that the word "charitable" in the above sections should be construed in the large sense in which it is used in the Income Tax Acts, is too general. *O'Neill v. Commissioner of Valuation. The Council of Alexandra College and School v. Same* - - - K.B., 447

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—Repair of—Liability of county council to pay contributions under National Insurance Act, 1911, in respect of labourers—Contract by county council for repair by contractor—Part of repair reserved to county surveyor—Legality 110, 120,
See LOCAL GOVERNMENT. 3, 4. [note]

RULES AND ORDERS—Rules of the Supreme Court—Order XIV, Rules 6, 8 - 533
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—County and Rural District Councillors (Ireland), No. 2, Election Order, 1899, Rule 4 (2); Rule 32 - 243
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SCHOOLS—*Irish Education Act*, 1892 (55 & 56 Vict. c. 42)—*Justices—Attendance order—Form of order—Necessity to specify in order the "regular manner" of attendance.*] Justices in making an attendance order under s. 4, sub-s. 1, of the *Irish Education Act*, 1892, must specify therein the "regular manner" in which the child is to attend the school. An attendance order which merely directs attendance to be made "in accordance with the requirements" of the Act, is not a good order under the statute. *Greenaway v. Murphy* [K.B., 59

SECURITY FOR COSTS—Workmen's Compensation Act—Appeal - 530
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SEDUCTION—*Master and servant—Loss of service—Service at time of seduction—Service at time of confinement.*] In an action by a father to recover damages for the seduction of his daughter, it appeared that the daughter had been engaged by the defendant's wife as a domestic servant, one of the terms of the employment being that during any absence from home of the defendant's wife the girl was to return to her father's house, and remain there unless called on to perform household duties in the defendant's house. During one of these periods of absence she was called to the house by the defendant, and there seduced by him. She was subsequently, while in the service of the defendant's wife, confined of a child, the confinement taking place in the defendant's house. *Held*, that a verdict directed for the defendant was sustainable. *Per O'Brien, L.C.*, on the ground that the girl was not in the service of the plaintiff at the time when the confinement took place: *per Cherry, L.J.*, on the ground that she was not in the plaintiff's service at the time of the seduction: *per Holmes, L.J.*, on either of these grounds. *Barnes v. Fox* - APP., 276

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SOLICITOR—*Costs*—*Charging order*—*Property recovered or preserved*—*Charge upon sum over which client has been appointed receiver by way of equitable execution*—*Legal Practitioners (Ireland) Act, 1876, 39 & 40 Vict. c. 44, s. 3.* Where a plaintiff had recovered judgment against the defendant, and had been appointed receiver by way of equitable execution over so much of a sum due to the defendant by a third party as should be sufficient to discharge the judgment debt and costs, the plaintiff's solicitor was held entitled to an order under sect. 3 of the Legal Practitioners (Ireland) Act, 1876, giving him a charge for his costs on the amount so payable to the plaintiff. *Duff v. Tuife* K.B., 31

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TELEPHONE—*continued.*

reason of the purchase by him of the plant, property, and assets of the company, and under the agreement of the 2nd February, 1905, he was bound by the contracts entered into by the Telephone Company with the plaintiffs, and specific performance of these contracts. *Held*, that the terms of the agreements between the Telephone Company and the road authority were applicable solely to the state of things which continued under the licence from the Postmaster-General to the company, and did not bind the Postmaster-General as assignee of the company; that the clause in the purchase agreement "subject to all wayleave and other rentals, contracts, and burdens," &c., had no applicability to the relations of the Postmaster-General with the road authority, these relations being regulated by statute and not by the agreements between the road authority and the company; that no right of action was given by sect. 4 of the Telegraph Act, 1892, any rights under that section being enforceable only in the manner provided by sects. 4 and 5 of the Telegraph Act, 1878, for the determination of differences; and that consequently the plaintiffs' action should be dismissed. *Dublin County Council v. Postmaster-General* - - - - - DODD, J., 208

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